The Illinois Central Case

In the Supreme Court of Illinois

Oral Argument

of

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TYPOGRAPHICAL UNION LABEL DANVILLE, ILL.

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THE STATE OF ILLINOIS
v.
THE ILLINOIS CENTRAL RAILROAD COMPANY.

Oral Argument of
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May it please the Court:

PRELIMINARY.

This is a suit brought by the State of Illinois against the Illinois Central Railroad Company to compel an accounting from the year 1877 to the present time. The original bill was filed in this court to the January term, 1907.

Our theory was that the per centum required to be paid into the state treasury under defendant's charter constituted *revenue*, within the meaning of section 2 of article VI of the constitution, and therefore this court had original jurisdiction of this suit.

A motion was made by defendant to dismiss the suit for want of jurisdiction. Its contention was that the word *revenue*, as used in section 2 of article VI, meant taxes and nothing more; that the moneys required to be paid into the state treasury, under defendant's charter, were in no sense taxes, but payments voluntarily agreed to be made on a contract with the state, in consideration of rights, privileges and franchises granted by the state.

We took no issue with defendant's counsel as to the character of these payments. What they said *then* was right *then* and is right *now*. Our contention was that the term "revenue," as used in section 2 of article VI, meant more than taxes; that it embraced all the annual or current income collected by the state for public use, whether produced by taxation or growing out of contract.

At the April term of this court, 1907, defendant's motion to dismiss was allowed, and leave was given the state to withdraw its bill without prejudice. The bill was thereupon filed in the circuit court of La Salle county, to the June term, 1907.

The defendant challenged the right of the attorney general to bring the suit, and entered a motion to dismiss. Afterwards this motion was withdrawn, and defendant was given until July

8, 1907, to file its demurrer, and the hearing thereon was set for October 7, 1907.

The demurrer to the original bill was argued by Judge Dickinson and Mr. Horton for nearly three days. It is unnecessary to say they made able arguments, because neither of these gentlemen make any other kind. The mental equipment and legal attainments of Judge Dickinson have been recognized by the nation—and we in Illinois are proud of it, and proud of him. While Mr. Horton's abilities are not so widely known, they are every whit as great. I will not say there is no abler lawyer, but I will say I have never met him.

While the original bill was carefully prepared and set up all the facts as we then knew them, at the time it was filed the investigation had only begun. I am safe in saying that none of us then fully appreciated the magnitude of this lawsuit.

During the period which elapsed between the filing of the original bill and the argument of the demurrer—some eight months—accountants were at work upon the company's books. New and important facts were discovered. Schemes for the division of joint earnings, practices between the charter and the non-charter lines, and methods of accounting, unknown to us when the original bill was drawn, were from time to time disclosed.

While the arguments made by Judge Dickinson and Mr. Horton did not convince us the original bill was bad, they did convince us the thing to do was to amend the bill and disclose fully all the relations between the company and the State and between the charter and the non-charter lines, and set out in the amendment each and every of the state's claims, with all the particularity and detail possible, in the light of the facts as we then knew them, in order that the principles of law applicable to the charter relations of the Illinois Central Railroad Company, and which must ultimately control the accounting sought, might be fairly raised by a demurrer to the bill.

For this reason we asked leave to amend the original bill—and leave was granted. Instead of amending the original bill, we prepared and filed an entirely new bill. No objection was made on this account.

The new or amended bill, which will hereafter be called the bill, was filed April 6, 1908. Including the interrogatories and exhibits, it comprises 352 printed pages. Six months were required in its preparation.

The demurrers were filed August 6, 1908. They consist of a general and special demurrer to the bill as a whole, and twenty-eight separate demurrers, both general and special, to different parts of the bill. They raise every conceivable objection, both as to substance and to form. These demurrers comprise 110 printed pages, and four months were required in their preparation.

The time consumed in preparing this bill and the demurrers thereto, in view of the multitude and importance of the questions involved, was not unreasonable. And I take this opportunity of saying there has been no desire nor attempt upon either side to delay this lawsuit.

JUDGE STOUGH'S DECISION.

The demurrers were argued before Judge Stough. The arguments began November 18, and ended December 16, 1908, occupying almost an entire month. On the very day the arguments closed, Judge Stough entered upon the trial of an important suit, in La Salle County, which lasted for over two months. Immediately thereafter he held the March term of court in his own county. The result was that the arguments made upon the demurrers, to a great extent, passed out of his mind. They had to be read over and the authorities reviewed. The magnitude of this task will be appreciated by the statement that the transcript of the arguments alone covers 2,500 typewritten pages.

On June 16, 1909, the demurrers were sustained. Judge Stough, in his opinion, among other things, said:

"I think some of the claims of the state are good, some are doubtful and some are bad; but an error on my part concerning any one of them would occasion a reversal of all that the master in chancery and I might do for the next couple of years and result in only a waste of time, labor and expense. Before this court embarks upon an accounting that will occupy years of time and before the enormous expense that would be incident thereto has been incurred, it is for the welfare of the state and to the interest of the defendant that the opinion of the supreme court be had upon the maze of questions presented by this bill.

"The charter relation of the Illinois Central Railroad Company to the State of Illinois has been a point of public contention for the past half century. During a part of that time the matter

has received the attention of political parties, and forty years ago it was made the subject of a provision in the state constitution. In view of the history of this controversy, it is a piece of folly for anyone to even hope that the report of an accountant appointed by me can quiet or put to rest this litigation. Why, therefore, should I waste both the money and time of the parties by a reference of this cause to the master?

"This is the third bill prepared and filed by the state, and after having listened to arguments on the demurrer for five weeks, by several of the foremost lawyers of the state, it does not appear wherein the present bill of complaint can be improved by further amendment. I will, therefore, without seeking any excuse for so doing, assist counsel in accomplishing that which they failed to accomplish when they filed their first bill in the supreme court, and by this course, I am sure, the best interests of both the state and the defendant will be conserved."

I am confident that I voice the sentiments of counsel upon both sides when I endorse and commend the courageous and intelligent action of Judge Stough. If it has no precedent, neither has this lawsuit.

CONTROVERSY SHOULD END.

To enter upon an accounting, covering a period of thirty years, and involving claims which aggregate millions, before the questions of law are settled and the bases of accounting ultimately fixed, would be as senseless and vain as to undertake to sail the seas without a compass and without a chart.

The interests of the state and defendant alike demand that defendant's charter, in all of its mooted features, be now construed; that the rights and duties of the State of Illinois and the Illinois Central Railroad Company be now clearly defined, and the questions of law pertinent to this controversy and applicable to the accounting sought be now settled and for all time.

If the Illinois Central, under its charter, owes the state money, it ought to pay it. If it does not, the state should cease claiming it. It is due to both sides that this question be now settled and this controversy be now ended.

Each and every of the state's claims are set up in this bill with all the particularity and detail possible. The bill, of course, is not perfect. In phraseology it might be improved. But, in our opinion, the case set up in this bill is the state's case, and all

of its case. And if a case is not made by this bill, the State of Illinois has no case.

The demurrer to the bill as a whole, and the demurrers to the different parts of the bill (which the court below sustained) raise every conceivable question of law which affects the relations between these parties. In this case, as in every other, there are a few big questions of controlling importance. But I respectfully submit that the interests of the people, the security of this defendant and the welfare of the future alike demand, not only that the big questions of law involved in this case be here and now settled, but the questions of lesser importance as well.

Acting, as I believe, in the interests of the people, and prompted solely by a desire to do my full duty, I earnestly ask that each and every question of law, presented by this bill or raised by these demurrers, be fully and finally determined by the decision of this court; that the opinion in this case be so sweeping and broad that there be no room for this controversey to live; and that from this time on the meaning of this charter and the rights and duties created by it shall rest, not in the opinions of governors nor railroad officials nor hired accountants nor legislative committees, but in the judgment of this court—a tribunal created by the constitution as the state's final arbiter of property rights, to whose decrees the citizen bows, in whose wisdom he feels secure and of whose integrity he has never had a doubt.

THE RELATION OF THE PARTIES.

One of the principal objections urged to this bill is that it does not state facts with sufficient particularity; that its averments are general and amount in law to mere opinion and conclusion. This objection is stated and restated and reiterated and then stated again.

Whether or not a bill is good—whether it avers sufficient facts or the facts are averred with sufficient particularity—depends upon circumstances. One of the circumstances is the relation of the parties. If they stand at arm's length, one rule of pleading applies. If they do not stand at arm's length, another rule of pleading applies. There is no fixed rule which applies in both cases.

At the very outset, therefore, the question to be determined is, what rule of pleading as to particularity in averment applies

to this bill? And since, in the determination of this question, the relation of the parties is the essential and controlling element —the very *sine qua non*—the first proposition to be considered is, what are the relations between the State of Illinois and the Illinois Central Railroad Company?

The discussion of this question requires a brief review of some of the early railway legislation of this state, the various land grants made by congress and the state, and a careful analysis of defendant's charter.

In 1837 an act was passed by the legislature of this state for a general system of internal improvements. The act, among other things, created a board of commissioners of public works, authorized the construction of a railroad from Cairo to La Salle, and appropriated three and a half million dollars in aid thereof. (Laws 1837, p. 121.) It is a matter of history that the state, after acquiring and surveying a right of way and spending large sums of money, under this act, abandoned the work.

In 1843 an act was passed, incorporating the Great Western Railway Company, and authorizing it to build a railroad from Cairo to La Salle and thence to Galena. The act granted the company all the right of way, lands and property acquired by the Internal Improvement Commission, to be appraised and paid for as provided in the act. (Laws 1843, p. 109.) The company entered upon the work of constructing the road, but the venture failed and its charter was finally repealed. (Laws 1845, 1849, 1851.) When this charter was finally repealed, all of the property granted by it and all the improvements made under it reverted to the state.

On September 20, 1850, congress passed an act granting to the State of Illinois a right of way through the public lands and every alternate section of land for six miles in width on each side thereof, to aid the state in constructing a railroad from Cairo to La Salle, with one branch to Chicago and another to Dubuque. This act of congress further provided that the lands granted should be subject to the disposal of the legislature of Illinois, and applied to the construction of said road and branches, and to no other purpose.

On February 10, 1851, the general assembly of Illinois passed an act incorporating the Illinois Central Railroad Company, the defendant in this suit. This act or charter contains twenty-seven sections. I shall not now discuss these sections in detail, but the scope of this charter as a whole.

This charter authorized the company to locate, construct and operate a main line of railroad and two branches; the main line to extend from Cairo to La Salle, one of the branches from Centralia to Chicago, and the other from La Salle to a point opposite the city of Dubuque.

It vested the corporate powers of the company in a board of directors and such officers and agents as they might appoint. The governor of Illinois was made a director *ex-officio*, with power to vote, either in person or by proxy.

The charter contains a number of provisions which have no direct bearing upon the issues here. They are largely matters of detail pertaining to the construction, completion and operation of the road, the sale of the bonds and the disposal of the lands. I shall not take time to mention them further.

By section 15 of this charter, the Illinois Central Railroad Company was granted all the lands ceded to the State by the act of congress of 1850. Furthermore, the company was granted depot grounds in the city of Cairo, the right of way and all of the improvements made thereon by the Internal Improvement Commission and the Great Western Railroad Company under the acts of 1837 and 1843, heretofore mentioned. All of this latter property was in addition to that ceded the state by the act of congress of 1850.

I shall digress for a moment from the analysis of this charter, to examine the character and extent of this land grant and the present attitude of defendant in relation thereto.

Under this charter, the Illinois Central Railroad Company was granted, by the State of Illinois, 2,595,000 acres of land. In square miles, this body of land was a principality; in fertility of soil, it was unsurpassed. The company was authorized to sell these lands upon credit and execute contracts for deeds, and no matter how long these contracts ran, the lands were exempt from taxation until actually conveyed to the purchasers—and this court has so held. (People v. Ketchum, 72 Ill., 212). This exemption not only enhanced the value of these lands, but gave impetus to their sale. The result was that down to 1875 the company realized from the sales of these lands over twenty-seven million dollars, and since that time nearly three million more.

Counsel say in their brief *that the value of the donation must be established as of the time it was given; that when the grant was made, government lands were selling at* $1.25 *per acre; that so valued, the grant, instead of being thirty million dollars, did not*

exceed three million; that the value of these lands increased on account of the road built by capital contributed by its stockholders.

Such statements as these avail nothing. Paragraph 17 of the bill avers that over two million acres of these lands were sold prior to 1875, at an average price of $11.94 an acre, and that from the sales of all of these lands the Illinois Central Railroad Company realized over thirty million dollars. And these facts are admitted by the demurrers.

In addition to these lands, the company was granted, by this charter, a right of way two hundred feet in width and seven hundred five and one-half miles in length.

The claim is now made that the Illinois Central Railroad Company is not the beneficiary of the State of Illinois; that it owes the state nothing because of this land grant—not even a vote of thanks. Furthermore, counsel insinuate the state was not warranted in attaching to the grant a provision securing to itself perpetual revenue.

They say, in their brief:

"While the federal land grant was to the state, a private company was intended as the ultimate donee. The state was but a trustee, having the duty to see that the lands were devoted to the purpose specified. The United States was the donor; the state the intermediary."

Their argument, in substance, is that since the lands were ceded by congress to the state, to aid in the construction of a railroad, and could be used for no other purpose, the state never owned a foot of these lands; that in truth and in fact these lands were granted by congress to the *Illinois Central Railroad Company*, and the state was a mere instrument to pass the title.

The fact is, when the lands were ceded by congress to the state, the Illinois Central Railroad Company was not in existence. It was not incorporated until five months later. There is nothing in the act of congress to show that the Illinois Central Railroad Company was then even thought of—and this court has so held. (Board of Equalization v. People, 229 Ill., 452.)

While the grant made by congress was to aid in constructing a railroad—and the lands could be used for no other purpose—the grant was made to the *State of Illinois*. While the object of the grant was to build a railroad—and the state was bound by this object—as to the means to be employed in accomplishing this object, as to how or by whom the road should be built, the state was absolutely free to determine.

The state itself could have built the road, applied the lands to the payment thereof and operated the road, as was done in the case of the Illinois and Michigan Canal, under a similar grant. Counsel say, the limit of indebtedness fixed by the constitution of 1848 made it well nigh impossible for the state to again undertake a work of such magnitude. In view of the land grant, this statement is remarkable.

The State could have let a contract to build the road, sold the lands to pay the cost of construction, owned the road and leased it.

The state could have renewed the charter of the Great Western Railway Company and granted the lands to it, or have granted the lands to any other company it saw fit to select. (Railroad Company v. Maryland, 21 Wallace, 456.)

The Illinois Central Railroad Company was chartered and these lands were granted to it by the State of Illinois, not from necessity, because there was none, but through voluntary action on the part of the state and in the exercise of its right to convey property, the title to which it then had.

Counsel say, in their brief: "The state seeks to create the erroneous impression that this railroad was constructed by the state's munificence." If it be true that this donation of lands was not made by the state; if it be true that this railroad was not constructed by the state's munificence, this court has been wrong for forty years. In Illinois Central Railroad Company v. Irwin, 72 Ill., 454, this court held that *no authority was given the company to engage in carrying except by the charter lines; that the charter related to this purpose and none other.* The court, per Justice Schofield, said: "It was to aid in it that the *munificent donation of lands was made by the state.*"

The contention, that when these lands were granted to the Illinois Central Railroad Company by the State of Illinois, the company was not the beneficiary of the state, which owned the lands and made the grant, reflects no credit upon this defendant.

Furthermore, by section 15 of this charter, property and valuable rights were granted to the Illinois Central Railroad Company, in addition to the lands ceded the state by the act of congress of 1850. It is idle to say this property was of little value. There is no basis whatever for any such claim.

By section 22, the company was exempted from the payment of all taxes, except state taxes, and even state taxes were limited as to rate.

As shown by the bill, the company accepted this charter, borrowed money on the strength of the land grant, built the road, sold the lands, and out of the proceeds got thirty million dollars. I will not say this was enough to build and equip the road, because the bill does not aver it. But I will say, what everybody knows, that in building and equipping a railroad seven hundred five and a half miles in length, thirty million dollars, or forty-two thousand dollars a mile, went a mighty long ways.

In the face of these facts, this company now declares that it is not now, and never has been, under a single obligation to the State of Illinois on account of this land grant. Some one says, "every furrow in the Book of Psalms is sown with the seeds of gratitude." I commend this Book to the present officials of the Illinois Central Railroad Company.

Section 18 of this charter provides, in part, as follows:

"In consideration of the grants, privileges and franchises herein conferred upon said company for the purposes aforesaid, the said company shall, on the first Mondays of December and June, in each year, pay into the treasury of the State of Illinois five per centum on the gross or total proceeds, receipts or income derived from said road and branches for the six months then next preceding. * * * And for the purpose of ascertaining the proceeds, receipts or income aforesaid, an accurate account shall be kept by said company, a copy whereof shall be furnished to the governor of the State of Illinois; the truth of which account shall be verified by the affidavits of the treasurer and secretary of such company. And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the governor of the State of Illinois, or any other person by law appointed, to examine the books and papers of said corporation, and to examine, under oath, the officers, agents and employees of said company, and other persons. * * *"

Section 22, after exempting the lands from taxation until sold, and the property of the company for six years, provides as follows:

"After the expiration of six years, the stock, property and assets belonging to said company shall be listed by the president, secretary or other officer, with the auditor of state, and an annual tax for *state purposes* shall be assessed by the auditor upon all the property and assets of every name, kind and description belonging to said corporation. Whenever the taxes

levied for *state purposes* shall exceed three-fourths of one per centum per annum, such excess shall be deducted from the gross proceeds or income herein required to be paid by said corporation to the state, and the said corporation is hereby exempted from all taxation of every kind, except as herein provided for. The revenue arising from said taxation, and the said five per cent of gross or total proceeds, receipts or income aforesaid, shall be paid into the state treasury in money, and applied to the payment of interest paying state indebtedness, until the extinction thereof: *Provided*, in case the five per cent provided to be paid into the state treasury, and the state taxes to be paid by the corporation do not amount to seven per cent of the gross or total proceeds, receipts or income, then the said company shall pay into the state treasury the difference, so as to make the whole amount paid equal at least to seven per cent of the gross receipts of said corporation."

The constitution of 1870 provides that after the payment of the state debt, the moneys payable under this section shall be appropriated and set apart for the payment of the ordinary expenses of the state government.

The last section of this charter provides as follows:

"This act shall be deemed a public act and shall be favorably construed for all purposes therein expressed and declared, in all courts and places whatsoever. * * *"

This provision, however, in no manner affects the rule of construction that would otherwise apply. This Court has expressly held that a provision of this kind has no legal significance whatever. (Theological Seminary v. People, 174 Ill., 177.)

Such, in brief, are the main provisions of this charter. Upon its acceptance, it became a contract between the State of Illinois and the Illinois Central Railroad Company.

In the Neustadt case (31 Ill., 484) this court, per Justice Breese, said:

"The act to incorporate the Illinois Central Railroad Company * * * is a contract between the state and the company, which cannot be changed or annulled without the consent of both contracting parties."

In the Goodwin case (94 Ill., 262) this court, per Justice Walker, said:

"It has been repeatedly held that this charter forms a contract between the state and the company."

In every other case where this charter has been before this court, the same doctrine has been announced.

This charter, being a contract between the company and the state, the rule of construction is that every doubt must be be resolved in favor of the state. The doctrine of this court may be summed up in this statement: *In construing a charter, if reasonable doubts arise, they must all be solved in favor of the state, and where two meanings are reasonably possible, one restricting and the other extending the favor of the corporation, the one must be adopted which works the least harm to the state.* Applying these rules to this charter, what obligations were created by it and what relations resulted from it?

The obligations of the state were to convey to the company the lands to build the road and exempt its property from the payment of all taxes, except state taxes. The charter itself created this exemption and the bill avers the lands were conveyed.

The obligations of the company, so far as now material, were to build and operate the road and branches and pay into the state treasury, each and every year, an amount *equal to at least seven per cent of the gross receipts derived from the road and branches, keep an accurate account of such receipts, and furnish the governor copies of the account.*

In other words, to the enterprise of building and equipping this railroad, the state furnished the capital, in the form of a franchise, a grant of lands and an exemption from general taxes. In consideration thereof, the company agreed to build the road, conduct the business of its operation, keep an accurate account of the total receipts, furnish the governor copies thereof, and pay to the state each and every year, on account of its investment, at least seven per cent of the total receipts derived from the road and branches. No other meaning can be given this contract.

Such being its meaning, what are the relations of the parties under it? In the transactions essential to its performance, do they stand at arm's length and upon an equal footing, or must trust and confidence be reposed by the one in the absolute honesty and fair-dealing of the other? If the latter be true—and it is true—a *fiduciary relation* exists.

Defendant's counsel insist that since the company is required to furnish the governor, semi-annually, a copy of its account, and since the governor is *ex-officio* a director in the

company, is authorized to examine the books, and the officers and agents, under oath, no fiduciary relation exists.

One answer is, the company has failed, semi-annually, or at any other time, to furnish the governor a copy of its account, as required by this charter.

It is true, the governor is a director *ex-officio*, and *for the purpose of verifying and ascertaining the accuracy of the account*, is authorized to examine the books and the officers and agents, under oath. But such provisions do not affect the fiduciary relation, if, without such provisions, the relation would exist, and the courts so hold. (125 Fed. Rep., 342.)

To say, because the governor is a director in this railroad, is authorized to examine the books and the officers and agents, under oath, the state can acquire, as to the business of the road, its earnings and receipts, equal knowledge with the company itself, is wasting words.

Under this charter the company runs the road, manages the business, collects the receipts and keeps the books. The acts and conduct, upon the performance of which the revenue of the state depends, are the acts and conduct of the Illinois Central Railroad Company, and by the good faith of these acts and the honesty of this conduct, the revenue of the state is measured. The books, records and accounts, and all of the facts which make up the transactions concerning which this accounting is sought, are peculiarly within the knowledge of defendant. The company owns the road, but its ownership is impressed with a duty to pay the state a per centum upon its gross receipts, and this duty is a continuing duty.

We do not claim a partnership exists between the company and the state. And a partnership is not essential to a fiduciary relation. We do not claim this charter creates, in a technical sense, the relation of trustee and *cestui-que-trust*. And this is not necessary to a fiduciary relation.

What we *do* claim is that, under this charter, continuous confidence is and must be reposed by the state in the honesty and fair-dealing of the Illinois Central Railroad Company. And whenever such a condition exists, by whatever name it may be called, a *fiduciary relation* exists.

The authorities hold—and many cases are cited in our brief—*that a fiduciary relation exists, not only between guardian and ward, trustee and beneficiary, and the like, but in every case where continuous confidence is reposed by one person in the honesty and*

fair-dealing of another; that the law looks to the real rather than to the nominal condition, and that courts are careful not to restrict the relationship by defining the exact limits of its existence.

In the recent case of State v. Chicago and Northwestern Railway Company, 132 Wis., 345, which was a suit by the state for an accounting, under a statute requiring railroads to file with the state treasurer a true statement of their gross earnings, for the purpose of obtaining a license and measuring the license fee to be paid the state, the court said:

"The relationship of the state and the defendant respecting these obligations is such that there is cast upon the defendant the duty of keeping a correct account of its gross earnings, to enable the state to ascertain the extent of its claim, and from this falls the duty of rendering to the state a true and correct report of these transactions. These circumstances, of necessity, create a relationship in which the defendant has the duty of protecting the rights of the state issuing out of the transaction, by keeping a true and correct record of its business affairs respecting them, and by rendering an account of its performance of this obligation."

In Western Union Telegraph Company v. American Bell Telephone Company, 125 Fed. Rep., 342 (decided in 1903), the facts were: The telegraph company, in order to protect its business against inroads by telephones, leased and transferred to the telephone company its interests in certain telephonic patents and equipment, whereby it was to receive a certain proportion of the rentals paid to the telephone company. The lease further provided that the books should be bept by the telephone company and be *open to the inspection of the telegraph company.* The court say:

"The telegraph company assigned substantially all its interest in telephonic patents, to be worked by the telephone company for their joint benefit, certain net results to be shared on an agreed percentage. While this did not create the technical relationship of trustee and *cestui-que-trust*, it established a *quasi trust.* * * * In contemplating the construction and effect of the contract, we must first of all consider that the relationship of the parties to it were of the *fiduciary character* to which we have referred. So that the telephone company, as the sole holder of the joint interests, left in exclusive control thereof, was bound to the underlying rule that neither directly

nor indirectly nor by any artifice whatever should the Western Union be deprived of its share in the net profits of the leases."

Many other cases to the same effect are cited in our brief. Neither the doctrines there announced, nor their application to this case, are challenged in defendant's brief. That under this charter a fiduciary relation exists between the State of Illinois and the Illinois Central Railroad Company, is beyond all question

MAGNITUDE AND INTRICACY OF ACCOUNTS.

Furthermore, the degree of particularity required in averment in a bill for an accounting largely depends upon and is measured by the character and extent of the accounts involved. I am safe in saying that in number, intricacy, detail and extent, the accounts involved in this bill have no parallels in the history of American courts.

Paragraph 157 of the bill avers, in part, as follows:

"That it would be impracticable for your orator, without improperly incumbering the records of this honorable court, to set forth in detail the many items of proceeds, receipts or income for which said defendant has failed to account to your orator; * * * that the books of account and the papers and vouchers referring to said items so omitted and referring to the items which have been falsely entered as aforesaid in the defendant's account, are so numerous and so voluminous that those pertaining to any single period of six months since the year 1877, would occupy almost the entire space of an ordinary railroad freight car in use at the present time, and the specification of all of said items omitted from or falsely entered in said account and apt allegations to charge the defendant therewith, would occupy many thousands of pages."

I confess, at first blush, this statement seems appalling. But when the intricacies of this lawsuit begin to unfold this statement will seem modest. The facts averred in this paragraph are admitted by the demurrers. Furthermore, the averment that the books, papers and vouchers pertaining to any six months' period, are so voluminous as to occupy the space of an ordinary freight car, is defendant's own statement. It was made to the governor as an excuse for not filing a detailed copy of the account. We trust defendant will not be so heartless as to now disown its own child.

RULES OF PLEADING APPLICABLE TO BILL.

This being a bill for an accounting covering a period of thirty years, the accounts being intricate and including thousands of items, a fiduciary relation existing between the parties, and the facts being peculiarly within the knowledge of defendant, what rules of pleading as to particularly and detail apply to this bill?

One rule of pleading is, *that whenever an enumeration of particulars would lead to great prolixity, a general statement is sufficient.*

Another rule is, *that all of the averments of a bill touching any given matter, must be taken together and not singly.* If all of the averments, including the exhibits, considered together, are sufficient to support a particular matter, the bill is sufficient in that respect.

Another rule is, *that whenever a fiduciary relation exists, all a bill for an accounting need aver are the facts showing the relation, the existence of unsettled accounts, a balance due, and in some cases a demand.* This doctrine is so well settled in this court, that to read decisions would only waste time.

Another rule equally well settled is, *that where the books and accounts are kept by the aefendant and the facts are peculiarly within his knowledge, details and items need not be set out, but general averments alone are sufficient.*

As was said by Mr. Justice Vickers, while on the appellate bench (116 App., 311):

"It falls harshly on the ear of a court of chancery to hear the defendant in error complaining that plaintiff in error has not set out specifically all the various items of the transaction when the record of them is in the possession of defendant in error."

Keeping in mind these well settled rules, an analysis of this bill will conclusively show that ample facts are sufficiently averred to support each and every of the state's claims.

ANALYSIS OF BILL—SEPARATE DEMURRERS.

For convenience, the bill is divided into paragraphs numbered from 1 to 168, inclusive.

Paragraphs 1 to 17, inclusive, set out the act of congress of 1850, which ceded the lands to the state, the charter of the Illinois Central Railroad Company, and the various amendments thereto, the acceptance of the charter and the construction of the main line and branches. The various public acts included in

these paragraphs were set out as a matter of convenience to counsel and the court.

The main line extends from Cairo to La Salle, a distance of 308.99 miles. One branch extends from La Salle to Dunleith, a distance of 146.73 miles. (Dunleith is now East Dubuque.) The other branch extends from Chicago to Centralia, or Branch Junction, a distance of 249.78 miles. The total length of this main line and these two branches is 705.5 miles. This main line and these two branches are denominated in the bill, and will be referred to in this argument, as the *charter lines*.

Paragraph 16 avers that the charter lines and the St. Charles Air Line (not here involved) were the only lines of railroad which the Illinois Central, under its charter, was authorized to build, acquire or operate.

Paragraph 17 avers, in substance, that the state, by its governor, conveyed to defendant, in fee simple, all of the lands ceded by the act of congress of 1850, together with a right of way, and all of the property mentioned and described in section 15 of the charter, and that from the sales of said lands the Illinois Central realized over thirty million dollars.

Paragraphs 18 and 19 aver, in substance, that down to about the year 1877, the *charter lines* comprised practically the entire system of railroads owned, controlled or operated by the Illinois Central Railroad Company, but shortly thereafter the company, assuming to act under the general railroad statutes of Illinois, began extensively and systematically to build and acquire other branches and lines of railroad in Illinois and elsewhere, for the purpose of ultimately building up and operating a great and extensive system of railroads.

THE NON-CHARTER LINES.

Paragraphs 20 to 62, inclusive, set forth and describe the different branches and lines of railroad acquired by defendant since 1877 and detail the various methods of their acquirement. Some of these lines were built by defendant; some were purchased outright; some were acquired by consolidation, and some were leased and afterwards taken over. A number of the leases are set out in these paragraphs. The reason therefor will be apparent when we get to the question of the division of earnings.

In acquiring these branches and lines of railroad, the Illinois Central Railroad Company neither acted nor assumed to act

under its charter powers, but under and by virtue of additional powers created and conferred by the general statutes of Illinois. While the state concedes defendant's right to lawfully exercise these additional powers and acquire and operate other lines of railroad, in no event and under no circumstances can these additional powers be exercised nor other lines of railroad be operated, to the prejudice or impairment of the rights of the state under defendant's charter. These additional powers, whatever they may have been, were subsequent to the charter and subject to all the contract rights which had then vested under it.

These various branches and lines of railroad acquired by defendant since 1877, under authority of the general statutes, are denominated in the bill, and will be referred to in this argument, as the *non-charter* or *branch* lines. If it be kept in mind that the words *charter lines*, whenever and wherever used in the bill and during this argument, include only the lines described in defendant's charter, and the words *non-charter lines* or *branch lines* include only the lines acquired by defendant since 1877, under authority of the general statutes, all confusion will be avoided.

THE ILLINOIS CENTRAL SYSTEM.

Paragraphs 63 and 64 refer to, and by express provision, make a part of the bill exhibits "1" and "2."

Exhibit "1" is found on pages 265 and 266 of the abstract. (The abstract pages are in red.) It is a detailed statement of all the lines and branches of railroad which make up the Illinois Central System. The mileage of the charter lines is first given. Then follows the termini and mileage of each one of the non-charter lines; the total number of non-charter lines and branches being 55. The total mileage of defendant's entire system is 4,377 miles. Of this mileage, the charter lines comprise 705½ miles, and the non-charter lines 3,672 miles.

Exhibit "2" is the map following page 266. By mistake it is marked exbibit "B" instead of exhibit "2." This map correctly represents the present system of railroads operated, controlled and practically owned by the Illinois Central Railroad Company. Will your honors, for a moment, kindly turn to this map following page 266?

The heavy lines in *red* represent the charter lines

The lines in *green* represent the non-charter or branch lines within the State of Illinois, and two or three branches extending into Indiana and Kentucky. The bill avers that all of these branches, except one, are now owned absolutely by the Illinois Central.

The line in *purple*, at the top of the map, extending from Chicago to Freeport, thence to Red Oak, and there branching to Madison and Dodgeville represents the Chicago, Madison and Northern Railroad, a non-charter line partly in Illinois and partly in Wisconsin. The bill avers that this line of railroad is owned absolutely by defendant.

The lines in *yellow*, at the top and left of the map, represent the Dubuque and Sioux City Branches. These branches, in the main, were constructed by Iowa corporations. The defendant acquired control of these Iowa corporations, and in 1899 consolidated them into one company, called the Dubuque and Sioux City Railroad Company. The capital stock of this consolidated company consisted of 80,000 shares, of the par value of $100 each, of which 78,973 shares were issued to and are now owned by defendant. This consolidated company, at various times, leased, or pretended to lease, all of these branches to the Illinois Central. The last lease was executed in 1904 and expires in 1951. These Dubuque and Sioux City branches comprise the western division of defendant's system, and connect with the charter lines at Dubuque by means of the Dubuque bridge.

The lines in *blue*, at the bottom and right of the map, represent the branches south of the Ohio river. These branches were constructed, in the main, by the Chicago, St. Louis and New Orleans Railroad Company, a corporation organized under the laws of Louisiana and other states. The defendant acquired a controlling interest in the stock and bonds of this company and immediately thereafter leased all of its property, rights and franchises for the term of 400 years from July 1, 1882. The lease required the Chicago, St. Louis and New Orleans Railroad Company to maintain its corporate organization and obligated the Illinois Central to purchase all of the outstanding shares of stock of the Chicago, St. Louis and New Orleans Railroad Company which might be offered. Pursuant to this lease, defendant acquired and now owns all of the capital stock and bonds of the Chicago, St. Louis and New Orleans Railroad Company. All of these branches and lines of railroad, designated in *blue*, lie south

of the Ohio river and comprise the southern division of defendant's system. This southern division connects with the charter lines at Cairo by means of the Cairo bridge.

The lines in *black*, at the bottom and left of the map, represent the Yazoo and Mississippi Valley lines. These lines were either constructed or acquired by the Yazoo and Mississippi Valley Railroad Company. The Illinois Central now owns practically all of the capital stock of the Yazoo and Mississippi Valley Railroad Company, and by reason thereof controls absolutely the operation of these lines. These Yazoo and Mississippi Valley lines connect, at various points, with the southern division of defendant's system and are operated in connection therewith.

All of the above facts, and in much greater detail, are averred in paragraphs 20 to 64, inclusive. The purpose of these averments was to disclose to the court, as fully and completely as possible, all of the facts relevant to the relations between the State of Illinois and the Illinois Central Railroad Company, whether created by charter, the general statutes of the state, or the acts of the company itself. A knowledge of these facts is absolutely essential to an adequate comprehension of the issues in this case.

THE POLICY OF EXPANSION.

During the argument of these demurrers in the court below, defendant's counsel had much to say about *the policy of expansion*. They eulogized the courage, business sagacity and self-sacrificing spirit of the officers and directors of the Illinois Central Railroad Company. They asserted that out of these qualities was born a policy under which the Illinois Central Railroad has grown from 700 miles to 5,000 miles; from a jerk-water line crossing a single state into a system spanning half a continent. They repeatedly declared, and with much emphasis, that as a result of this far-sighted policy, millions of revenue have accrued to the state.

Substantially the same argument is found in their brief. After summarizing the totals contained in the semi-annual statements, counsel say:

"These figures show that, with due allowance for the periods of great business depression, the payments have steadily increased until from a payment of $320,431.71, made in 1878, the

state received, in 1906, nearly twelve hundred thousand dollars. They make it plain that through the policy of expansion * * * the state has immensely profited."

What legitimate purpose can be subserved by such an argument is not very clear. That the state has profited by the development of this railroad has never been denied. Nobody claims the Illinois Central has yet succeeded in appropriating all of the increased revenue.

Furthermore, the policy of expansion attributed by counsel to the courage and philanthropy of officials, was in fact due to the generosity and liberal legislation of the State of Illinois. Because of the land grant made in 1851 and the exemption from taxation, it is a matter of history that the Illinois Central was paying dividends, had money invested in stocks and bonds, and was able to expand at an early day and when other roads were struggling to exist.

The Illinois Central, under its charter, had no right to build, purchase, lease or operate a single mile of railroad, other than the lines described in its charter. Its business, rights and powers were limited absolutely to these charter lines, and this court so held in 1874. In the Irwin case (72 Ill., 454) this court, per Justice Scholfield, said:

"No authority is given to construct other lines of railroad or to engage in carrying by water or otherwise than by the lines of railway so to be constructed. Every section of the act relates to the accomplishment of this purpose, and *none other*."

After this decision, the State of Illinois, through its legislatures, but subject to the rights, duties and obligations created by the charter, extended and enlarged the powers of defendant by general statutes. In the expansion and growth of the Illinois Central System, back of the courage, foresight and philanthrophy of directorates, were the land grant of the state supplying the funds, and the general statutes of the state conferring the power.

As a result, in part at least, of this policy of expansion and growth, the charter line business has increased and the revenue of the state has multiplied. But this is not the issue involved in this lawsuit.

The issue is, has the Illinois Central Railroad Company rendered to the State, in the way of per centum, *all* that is due under this charter? The state is entitled to a per centum, not only upon *part* of the increased earnings of the charter lines, but upon *all* of the increased earnings of the charter lines. The state

admits it has received a per centum upon *part* of the increased earnings of the charter lines, but it avers in this bill it has *not* received a per centum upon *all* of the increased earnings of the charter lines. This is the issue presented here, and this issue must be met. It can neither be side-tracked nor concealed behind a "straw man."

INTRICACY OF ACCOUNT—DUAL INTERESTS.

Paragraph 65 avers, in substance, that while defendant's system was confined, or practically confined, to the charter lines, the matter of ascertaining the gross or total receipts derived from the charter lines and keeping an accurate account thereof, as required by the charter, was comparatively simple. But after the acquirement of the non-charter lines and the operation of the charter and non-charter lines as one entire system, the matter of ascertaining the gross receipts derived from the charter lines and keeping an accurate account thereof became more involved and difficult.

Not only was this true, but when defendant acquired these non-charter lines and linked them up with the charter lines into a single system, its interests, in part, became adverse to the state, and this fact cannot be disguised. Thereupon the interests of defendant centered in the operation and success of this system as a whole. The per centum of the state applied only to the charter lines. The net earnings of both the charter and the non-charter lines flow into defendant's treasury, and, in the aggregate, make up its profits. Its chief concern is the amount of this aggregate, and not the sources from which it comes.

Upon the gross earnings of the charter lines, the defendant must pay a per centum to the state. Upon the gross earnings of the non-charter lines, it pays no per centum to the state whatever. Under such conditions, it needs no argument to show that the interests of this defendant lie in increasing the earnings of the *non-charter lines*, at the expense of the earnings of the *charter lines*, whenever and wherever it can be done without injuring the business of the system as a whole. And the bill avers that this has been done, and systematically done. We do not question defendant's right to operate the charter and non-charter lines as one entire system. But we do say that under this charter, and the fiduciary relation existing, in the operation of this system, the movement of traffic and the division of joint

earnings, this defendant must treat the state with absolute honesty and fairness.

DUTY UNDER SECTIONS 18 AND 22.

Paragraph 66 avers, in substance, that upon the acceptance of the charter, it became the duty of defendant, as provided by sections 18 and 22,

First—To pay into the state treasury, on the first Mondays of December and June of each year, five per centum of the gross or total proceeds, receipts or income derived from the charter lines for the six months preceding, keep an accurate account thereof, and furnish the governor a copy of such account, verified by the oaths of its treasurer and secretary.

Second—After six years, to list with the auditor, annually, for the purpose of state taxation, its stock, property and assets, and pay into the treasury the state taxes assessed thereon.

Third—In case the said five per centum and the said state taxes, in any year, did not amount to *seven* per cent of the gross receipts of the charter lines, to pay into the treasury the difference, so as to make the whole amount paid, during each and every year, equal *at least* to seven per cent of the gross receipts of said corporation.

FAILURE TO ASSESS TAX—CONSEQUENT DUTY.

Paragraph 67 avers, in substance, that in each and every year, from 1859 to 1905, the defendant knew that five per centum of the gross receipts of the charter lines and the state tax upon its property, when taken together, would not amount to *seven* per cent of the gross receipts of the charter lines (the minimum sum it was required to pay), and the auditor likewise knew these facts; that for these reasons the defendant did not list its property with the auditor for taxation and the auditor did not require said property to be listed and did not assess a state tax thereon, in any of said years.

That upon the failure of defendant to list its property for taxation and upon the failure of the auditor to require it to be listed and a state tax assessed thereon, it became and was the duty of defendant, in each of said years, to pay into the treasury an amount equal *at least* to seven per cent of the gross receipts of the charter lines; that defendant recognized this to be its duty

and during each of said years assumed and undertook to comply therewith by paying into the treasury seven per cent of the total receipts of the charter lines, as claimed and reported by it.

Other parts of the bill, however, aver that the total receipts, as claimed and reported by defendant, were not correct in any of said years. In this paragraph the state disclaims all right to now collect a state tax upon defendant's property. This disclaimer was made to meet an objection urged to the original bill, namely, that without such disclaimer an annual state tax can now be collected from 1859 to 1905. The disclaimer itself amounts to nothing, and neither does the objection it was intended to meet.

Paragraphs 68 and 69 aver, in substance, that in the years 1905 and 1906, defendant listed its property with the auditor for taxation, and the auditor assessed a state tax thereon, but the tax so assessed, together with the five per centum, did not amount to seven per cent of the gross receipts of the charter lines, and defendant, in each of said years, paid into the treasury seven per cent of the gross receipts of said charter lines, as claimed and reported by it.

DEFENDANT'S ACCOUNT ERRONEOUS AND DISHONEST.

Paragraphs 70 to 73, inclusive, aver, in substance, that while it was the duty of defendant, for the purpose of ascertaining the gross receipts derived from the charter lines, to keep an accurate account thereof, for each semi-annual period, verified by the affidavits of its treasurer and secretary, and furnish the governor a copy of such account, the defendant, in fact, wholly failed so to do; that in pretended compliance with this duty, it furnished the governor semi-annually, certain documents, purporting to be statements of the gross receipts of the charter lines, but none of these statements were *copies of the account*, as required by the charter.

Section 18 of the charter, in part, provides:

"And for the purpose of ascertaining the proceeds, receipts or income aforesaid, an accurate account shall be kept by said company, a copy *whereof* shall be furnished to the governor of the State of Illinois; the truth of which *account* shall be verified by the affidavits of the treasurer and secretary of such company."

Copies of the semi-annual statements furnished the governor are attached to the bill as exhibits "3" to "60," inclusive.

Will your honors kindly turn to exhibit "3?" It is found on page 267 of the abstract. The heading to this statement is, "Illinois Central Railroad Company. Statement of Gross Earnings in Illinois for the Six months Ending 30th April, 1878." Then follow, under the classification of "Freight," "Passenger," "Mail", "Express," "Miscellaneous," and "Total," the earnings for the months of November, December, January, February, March and April—the six months included in the semi-annual period. Then follows a recapitulation and a computation of seven per cent on the earnings reported. This statement shows, upon its face, that it is not a copy, nor substantially a copy, of anything, but merely a summary of monthly totals. Below the recapitulation is an affidavit by John C. Welling, auditor, to the effect that "the foregoing statement of gross earnings derived from said road for the six months ending 30th April, 1878, is a *correct abstract and statement* from the books and accounts of said company." Welling's affidavit might be true and the account itself might be false. He swears to nothing more than that the foregoing statement of gross receipts is a *correct abstract and statement from the books and accounts.*

All of these exhibits from "3" to "60," inclusive, as to form and verification, are alike, except as to the classification of earnings. In the more recent statements, the earnings are classified with greater detail. These exhibits demonstrate that the semi-annual statements furnished the governor were neither actual copies of the account, substantial copies of the account, nor partial copies of the account, but mere *classified aggregates* from the account.

AVERMENTS SUFFICIENT TO IMPEACH ACCOUNT.

Paragraphs 74 to 79, inclusive, impeach the honesty and accuracy of these statements and the books of account kept by defendant.

Paragraph 74 avers that each and every of said statements

> "was falsely and fraudently made and was and is untrue and incorrect, as defendant well knew at the time such statement was made, and was not a true statement of the total or gross proceeds, receipts or income derived by

> defendant from said charter lines for the six months covered by the statement; that in fact and in truth, as defendant well knew, the gross proceeds, receipts or income derived from said charter lines during each of the aforesaid periods, * * * were much more than the amounts represented by defendant in said statements respectively; that each and all of said pretended statements were made and furnished to the governor by defendant, and the amounts of the gross receipts were falsely given therein, as aforesaid, with the intention of defrauding your orator out of large sums of money due from defendant, out of the proceeds, receipts or income which were actually derived by defendant from said charter lines."

Defendant's counsel insist that the averments of this paragraph amount, in law, to mere opinion and conclusion. They cite many cases in support of the rule, that where *fraud* is relied on, the facts must be averred, and not conclusions deduced therefrom; that facts, well pleaded, are admitted by a demurrer, but not the conclusions drawn by the pleader. That this is the rule, we do not dispute.

It is true, the words "falsely" and "fraudulently" are used in this paragraph, and these words are expressive of conclusion. But the use of these words is common in pleading, and while they add nothing, they detract nothing. Without these words, this paragraph is sufficient. Its averments, in substance, are that each of these semi-annual statements purported to show all of the receipts received by defendant from the charter lines, for a given period, but *did not* show all of the receipts received by defendant from the charter lines for such period, and defendant knew it when the statement was made. If these facts are true, and under the demurrers they are true, these semi-annual statements were knowingly false.

Paragraph 75 avers, in substance, that many thousands of items of receipts derived by defendant from the charter lines were wholly omitted from its account, and none of the items so omitted were ever reported and no per centum was paid thereon.

The remainder of these paragraphs aver, in substance, that in said account, defendant knowingly entered hundreds of thousands of items of receipts derived from the charter lines at less than the actual amounts received, and that the differences between the items actually received and the items so entered in

said account were never reported to the governor and no per centum was paid thereon; that the items so actually received by defendant and entered at less than the true amounts were proceeds, receipts or income derived from the carriage of freight, passengers, mail and express, partly over the charter and partly over the non-charter lines; that because of the omission of these thousands of items from defendant's account, and because of the entering therein of these hundreds of thousands of items at less than the true amounts received, and because of the fact that defendant paid to the state a per centum *only* upon the receipts included in said account, it owes the state a large sum of money, to-wit, the sum of fifteen million dollars.

Defendant's counsel undertake to wipe out and annihilate all of these averments with the single statement, "they are mere conclusions." They furthermore insist, because these paragraphs, for greater certainty, expressly refer to subsequent paragraphs, in determining the sufficiency of this bill these paragraphs themselves should be utterly ignored; that they are nothing but sign-boards pointing somewhere else. I know of no rules which warrant this assumption. The averments of one part of a bill are neither destroyed nor impaired because they refer to another part. Whether or not the bill is sufficient depends upon both parts taken together. The averments of of these paragraphs are not mere conclusions and cannot be tortured into mere conclusions by singling out the words "cheat" and "defraud" and ignoring the body of the paragraphs themselves.

The averment, that thousands of items of charter line receipts were knowingly omitted from defendant's account, is the averment of a fact. The averment, that defendant actually received hundreds of thousands of items of charter line receipts and set down these items in its account at less than the items actually received, is the averment of a fact. The averment, that defendant has paid a per centum *only* upon the earnings included in its account, is the averment of a fact. Every one of these facts is admitted by the demurrers.

The charter requires the Illinois Central to keep an accurate account of the total receipts derived from the charter lines, and pay into the treasury, each and every year, *at least* seven per cent of such total receipts. If it be true, as these paragraphs aver, that thousands of items of charter line receipts were wholly omitted from defendant's account; that hundreds of thousands

of items of charter line receipts were knowingly entered in its account at less than the items actually received and no per centum was paid thereon. it necessarily results, as a conclusion of law, that defendant is now indebted to the state.

The only objection which can be urged to these paragraphs is, that the averments are not sufficiently specific; that dates, amounts and the particular sources of all the various items are not set out. But in view of the circumstances disclosed by this bill, this objection is frivolous.

Defendant's counsel insist the same rules of pleading apply to the state as to any other litigant, and I agree with them. We are courting no favors because the complainant is the State of Illinois. They furthermore insist that under the ordinary rules of pleading, it is not sufficient to aver in the bill *that thousands of items of the gross receipts derived by defendant from the charter lines were wholly omitted from its account, and hundreds of thousands of items of such receipts were credited by defendant, in its account, at less than the items actually received*, and then aver generally the sources of these items; but the state must go further—and infinitely further—and set out in the bill the date, amount and particular source of each and every one of these hundreds of thousands of items.

If such were the rule, the bill in this case would contain more pages than the combined volumes of the Illinois Reports. It would take a year to read it. Any court in the land, of its own motion, would strike it from the files. If such were the rule, the State of Illinois would be forever precluded from having its rights under this charter adjudged in any court. I confidently assert there is not now, never was and never will be a rule of pleading which works such results, either to a state or to any other litigant.

In view of the *fiduciary relation* which here exists; in view of the fact that the transactions involved in this account are peculiarly within defendant's own knowledge; in view of the enormity of this account and the multitude of items embraced in it, under any rule of pleading reasonably applied, the averments of these paragraphs are amply sufficient to make a *prima facie* case, and nothing more is required.

Counsel say, in their brief:

"The charter gives the governor full power to acquire all the needed information. The court judicially knows that more

than two hundred thousand dollars have been expended by the present administration for that purpose."

I will not say this is a sample of *all* the statements of fact contained in defendant's printed brief and argument, but I will say it fairly illustrates the character of many of them.

On March 19, 1907, there was appropriated to the governor, for the purpose of investigating the books and accounts of the Illinois Central Railroad Company, the sum of $100,000. On the same day there was appropriated to the attorney general, to employ special counsel and defray other expenses, the sum of $50,000. Of the $100,000 appropriated to the governor, there remained in the treasury unexpended, on July 1, 1909, $83,118.10. This balance was re-appropriated to the governor by the last general assembly. Of this balance, there remained in the treasury, on October 1, 1909, over $80,000.

The last general assembly appropriated to the attorney general for this suit the further sum of $50,000. The total appropriation was $55,000, but of this amount $5,000 was to pay expenses in submerged land matters, and the act was broadened to include this purpose. Of this $50,000, not one cent has yet been expended.

The present administration, instead of spending more than two hundred thousand dollars, has expended, all told, less than seventy thousand dollars, and recent reports made to the governor conclusively show that this money was well expended. Most of the bread cast upon the waters of this investigation has already returned.

THE CAIRO BRIDGE.

Paragraphs 80 to 95 relate to the Cairo bridge and the arbitraries charged on account thereof. These paragraphs aver, in substance, that the acts of congress of 1872 and 1883 authorized any persons or corporations, having lawful authority therefor, to erect bridges across the Ohio river for railroad and other purposes, which acts of congress were duly accepted by the Chicago, St. Louis and New Orleans Railroad Company; that the Illinois Central and said Chicago, St. Louis and New Orleans Railroad Company procured the legislature of Kentucky to pass an act authorizing them, jointly or separately, to build and maintain a railroad bridge across the Ohio river, including the necessary approaches and embankments, from a point in Ken-

tucky opposite the city of Cairo, Illinois, to any point in said city of Cairo, which act was duly accepted by the Chicago, St. Louis and New Oleans Railroad Company.

That said Chicago, St. Louis and New Orleans Railroad Company, under authority conferred by the acts aforesaid, and the Illinois Central Railroad Company, under the authority of its charter and said acts of congress, and during the year 1887, began the construction of said bridge, and completed and opened said bridge for traffic in the month of October, 1889; that all that part of said bridge located east of the northwestern shore of the Ohio river is within the state of Kentucky and the balance of said bridge is within the state of Illinois. Your honors will recall that the boundary line of Illinois is not the center thread of the Ohio river, but the northwestern shore thereof.

These paragraphs further aver that said bridge as constructed was 104 feet above low water and was 3.87 miles in length; that the part of said bridge which spans the Ohio river proper is about three-fourths of a mile in length and is entirely within the state of Kentucky; that the part of said bridge dominated by defendant, the southeast or Kentucky approach, is located entirely within the state of Kentucky and is about $1\frac{1}{2}$ miles in length; that the part of said bridge dominated by defendant, the northwest or Illinois approach, is located entirely within the state of Illinois and is about 1.6 miles in length, of which about one mile was originally constructed of wood and the balance of iron and steel; that the part so originally constructed of wood has been displaced by an earth embankment, which earth embankment, at its northerly end, is 15 feet above the natural surface of the ground, and at its southerly end, to-wit, at its point of connection with the steel and iron frame work, is 50 feet above the natural surface of the ground, and 185 feet in width at its base; that said so-called Kentucky and Illinois approaches are now and always have been integral parts of said bridge and so treated by defendant; that of the total length of said bridge, about $2\frac{1}{4}$ miles are in the state of Kentucky and about $1\frac{1}{2}$ miles are in the state of Illinois.

That the part of said bridge within the state of Illinois was constructed by defendant, and cost the sum of five hundred thousand dollars; that while the part of said bridge within the state of Kentucky was ostensibly constructed and paid for by the Chicago, St. Louis and New Orleans Railroad Company, in truth and in fact it was constructed and paid for by this de-

fendant; that at and prior to the time of the construction of the part of said bridge within the state of Kentucky, defendant owned all of the capital stock and bonds of the Chicago, St. Louis and New Orleans Railroad Company; that the total cost of the entire bridge was about three million dollars, every dollar of which was paid by defendant, and upon completion of said bridge, defendant became, and is now, the equitable owner thereof.

That on June 2, 1890 defendant entered into a pretended lease with said Chicago, St. Louis and New Orleans Railroad Company, whereby said company pretended to lease to defendant the part of said bridge within the state of Kentucky, for a term of 392 years, at an annual rental of $180,000, since which time the defendant has used and operated said bridge as a part of its line of railroad, and said bridge, in truth and in fact, *is* a part of defendant's said line of railroad: that all of the freight, passenger and other traffic moving between the *charter* lines and the *non-charter* lines, south of the Ohio river, is transported over said Cairo bridge.

These paragraphs further aver that since the month of June, 1890, defendant has uniformly deducted an arbitrary charge of two cents per hundred pounds on all freight of every kind and description, and an arbitrary charge of twenty-five cents for each and every passenger transported over said Cairo bridge, which arbitrary charges were credited by defendant to what it has denominated "bridge arbitrary," and were deducted from the aggregate freight and passenger receipts of the charter lines, and the non-charter lines south of the Ohio river, before said receipts were divided or apportioned between the charter and said non-charter lines.

That in making rates for the transportation of freight and passengers, between points north and south of the Ohio river, on the lines of defendant's system, nothing whatever was included by it on account of said "bridge arbitraries."

That the total "bridge arbitraries" charged and collected by defendant and deducted from the aggregate receipts of the charter and said non-charter lines as aforesaid, was nearly fifteen million dollars. A statement of these "bridge arbitraries" is set out in parargaph 91. This statement begins with the year 1890 (when the bridge was opened) and covers the sixteen succeeding years. It shows the amount of "bridge arbitraries" collected by defendant and deducted from freight and passenger

receipts during each of said years, the total for all of said years being $14,995,441.87.

Except the averment that defendant is the equitable owner of the bridge, each and all of the averments contained in these paragraphs, up to paragraph 92, are averments of fact.

In paragraphs 92 to 94, inclusive, we advance our theories as to the law. These theories, I admit, are largely conclusions, and might have been omitted. But because they were not, the bill is not bad. These three paragraphs aver, in substance,

First—That defendant had no right whatever, as against the state, to deduct from the gross receipts of the charter lines any "bridge arbitrary," or portion thereof, on account of said bridge; that because of the equitable ownership of said bridge by defendant and its failure to add said arbitraries to the rates, the mileage of said bridge should be treated by it in the division of receipts as any other like mileage of its railroad; that of the total "bridge arbitraries" charged and deducted by defendant, one-half thereof was deducted from the gross receipts of the charter lines.

Second—That if it be held that the lease made by the Chicago, St. Louis and New Orleans Railroad Company to defendant is valid and binding as against the state, and under said lease defendant is entitled to deduct a "bridge arbitrary," *then* defendant should credit to the charter line receipts such proportion of said "bridge arbitrary" as the length of the bridge in the state of Illinois bears to the entire length of the bridge.

It will be observed, the claim of the state, as set forth in paragraphs 92 and 93 is, that of the total sum deducted by defendant from the through rates, on account of "bridge arbitraries," one-half thereof, or more than seven million dollars, was deducted from what would otherwise have been apportioned to the charter lines; in other words, that defendant failed to report more than seven million dollars of charter line receipts. The reason assigned by defendant for its failure to report these receipts is, that it was entitled to this seven million dollars as "bridge arbitraries." In these paragraphs the state does not claim any portion of the "bridge arbitraries" as such, but claims that on account of their deduction the charter lines receipts were over seven million dollars short.

In paragraph 94 the claim of the state is, that if the pretended lease between the Chicago, St. Louis and New Orleans Railroad Company and the defendant is valid and binding as against the

state, then, inasmuch as the Illinois approach, which constitutes two-fifths of the bridge, is located upon the right of way of the charter lines, two-fifths of the arbitraries charged for the use of the bridge should be apportioned to the charter lines.

In other words, the state contends that the portion of this bridge within the state of Illinois, denominated the "Illinois Approach," is a part of the charter lines—and this court has so held. (Board Equalization v. People, 229 Ill., 464.) And if a part of this bridge belongs to the charter lines, a part of the receipts derived from this bridge must be credited to the charter lines.

THE DUBUQUE BRIDGE.

Paragraphs 99 to 109, inclusive, relate to the Dubuque bridge. These paragraphs aver, in substance, that the Dunleith and Dubuque Bridge Company, an Illinois corporation, acting under authority of congress and the laws of Illinois and Iowa, constructed a railroad bridge across the Mississippi river, between the city of Dubuque, in the state of Iowa, and the town of Dunleith, in the state of Illinois, which said bridge was opened for traffic in 1869; that the authorized capital stock of said Dunleith and Dubuque Bridge Company was one million dollars, of which three hundred thousand dollars was subscribed by the Illinois Central Railroad Company.

That shortly after the construction of said bridge, and prior to 1878, the Illinois Central acquired, by purchase, all of the capital stock of said Dunleith and Dubuque Bridge Company, and thereby became and now is the equitable owner of said bridge; that in 1867 (before the bridge was opened), defendant entered into a pretended lease with said Dunleith and Dubuque Bridge Company, whereby said company pretended to lease said bridge to defendant in *perpetuity*, at an annual rental of $150,000; that since the completion of said bridge, defendant has used and operated the same as a part of its line of railroad; that all of the traffic moving between the charter lines and the non-charter lines, west of the Mississippi river, is transported over said Dubuque bridge.

That from November 30, 1877, to November 30, 1899, defendant deducted an arbitrary charge of two cents per hundred pounds on all freight of every kind and description, and an arbitrary charge of twenty-five cents for each passenger transported over said Dubuque bridge, up to $150,000 a year, and *no more;*

that during said period, on the first day of January of each year, defendant began making said deductions, and continued so to do until the total deduction for said year amounted to the sum of $150,000, the annual bridge rental provided in said lease.

That from November 30, 1899, to October 31, 1905, defendant charged and deducted said "bridge arbitraries," not only up to $150,000 a year, the amount of the rental, but upon every pound of freight and upon every passenger transported over said Dubuque bridge.

A statement of the "bridge arbitraries" deducted during said last named period is set out in paragraph 105. Will your honors kindly turn to abstract page 188? This statement shows that the "bridge arbitraries" deducted during the first year amounted to $290,156.16, or $140,000 more than the total annual rental provided in the lease. During the last year, to-wit, from October 31, 1904, to October 31, 1905, defendant charged and deducted, in arbitraries, for the use of this bridge, $650,139.56.

The capital stock of the Dunleith and Dubuque Bridge Company, which built the bridge, was one million dollars. If this bridge cost the entire amount, during a single year covered by this statement, defendant charged and collected, for the use of this bridge, over sixty-five per cent of its total cost. These "bridge arbitraries" were deducted from the joint receipts of the charter lines and the non-charter lines west of the Mississippi, derived from traffic which crossed the bridge, and before said receipts were divided or apportioned between the charter and said non-charter lines. The bill avers that at least one-half of all these "bridge arbitraries" were deducted from the receipts of the charter lines. Upon these "bridge arbitraries" no per centum was paid the state. Every "bridge arbitrary," therefore, deducted in whole or in part from the charter line receipts, diminished the gross receipts upon which the state was entitled to a per centum.

These paragraphs further aver that since the month of October, 1905, defendant has annually deducted, in "bridge arbitraries," only the sum of $150,000, the annual rental provided in the lease.

The averments contained in the remainder of these paragraphs, up to paragraph 107, with one or two exceptions, are averments of fact and substantially the same as those relating to the Cairo bridge.

Paragraphs 107 to 109, inclusive, set up our theory of the law, and are largely conclusions. They aver, in substance:

First.—That defendant had no right whatever (for the reasons stated as to the Cairo bridge) to deduct said arbitraries, either in whole or in part.

Second.—That if the lease between defendant and the Dunleith and Dubuque Bridge Company be held to be valid, and under said lease defendant is entitled to deduct "bridge arbitraries," in no event can the arbitraries deducted in any year exceed the sum of $150,000, the rental reserved in said lease.

THE BRIDGE ARBITRARIES.

As affecting the right to deduct bridge arbitraries from the gross receipts of the charter lines, the state contends that the Illinois Central accomplished nothing by building these bridges in the names of other companies instead of building them in its own name; that it accomplished nothing by leasing these bridges from companies which it owned or controlled, and operating the bridges as a nominal lessee; that it could not do indirectly what it could not do directly.

The act procured from the state of Kentucky authorized the Chicago, St. Louis and New Orleans Railroad Company and the Illinois Central, or either of them, to build the Cairo bridge. But the Illinois Central did not dare construct this bridge in its own name and operate it in its own name. It knew if it did, that not one dollar, either of expenses for bridge maintenance or of arbitraries for bridge use, could be deducted from the charter line receipts. And the same was true of the Dubuque bridge.

How can this defendant do under *another* name what it could not do in its own name? How can it deduct bridge arbitraries from the gross receipts of the charter lines in the name of the Chicago, St. Louis and New Orleans Railroad Company, when it could not deduct them in the name of the Illinois Central Railroad Company? A court of equity looks to the thing *done* and not to the manner in which it is done. What was done was, deduct over seven million dollars, in bridge arbitraries, from the gross receipts of the charter lines. All the benefits from this transaction accrued absolutely to the Illinois Central; every dollar of these bridge arbitraries went into the treasury of the Illinois Central. The bill so avers and the demurrers so admit.

Counsel say these bridges were constructed by independent corporations and are independent concerns. They say the Cairo bridge was built by the Chicago, St. Louis and New Orleans Railroad Company, under a Kentucky charter; that when the bridge was completed, the Chicago, St. Louis and New Orleans Railroad Company, as it had a legal right to do, leased the bridge to the Illinois Central for the term of 392 years, at an annual rental of $180,000; that the Illinois Central has operated this bridge as the lessee of an independent company, and must be treated by the state precisely the same as though it were an independent company.

They say the Dubuque bridge was built by the Dunleith and Dubuque Bridge Company, an independent concern, under charters granted by Illinois and Iowa; that shortly after its completion it was leased to the Illinois Central *forever*, at an annual rental of $150,000; that as to *this* bridge, the Illinois Central must be treated by the state as an independent bridge company. This sounds well when you hear it, if it is all that you know, but when you know the facts, it smacks of farce.

The lease made by the Dunleith and Dubuque Bridge Company, under the averments of this bill, was simply the act of the Illinois Central. At the time it was made, the Illinois Central owned a majority of all the capital stock of this bridge company and shortly thereafter acquired the remainder.

The Kentucky part of the Cairo bridge was built in the name of the Chicago, St. Louis and New Orleans Railroad Company, but the money was furnished by the Illinois Central. When the bridge was built, the Chicago, St. Louis and New Orleans Railroad Company could not have raised sufficient funds to buy a postage stamp. Its name could not have been found in any current railroad guide in the United States. Five years before, it had leased to the Illinois Central, for 400 years, all of its property, rights and franchises of every kind and description, and the bill so avers.

When the lease was made by the Chicago, St. Louis and New Orleans Railroad Company to the Illinois Central, the Illinois Central owned every dollar of the capital stock and every outstanding bond of the Chicago, St. Louis and New Orleans Railroad Company. As sole stockholder, it was sole dictator. Over the property and affairs of the Chicago, St. Louis and New Orleans Railroad Company its will was supreme and its control was absolute.

In the light of these facts, what does it avail, in a court of equity, to invoke legal fictions? What does it avail to say that in the transactions involving the construction, leasing and operation of the Cairo bridge, the Chicago, St. Louis and New Orleans Railroad Company and the Illinois Central Railroad Company were independent concerns?

Under these leases, the Illinois Central has simply dealt with itself. If it has paid any rental, as lessee, it has paid it to itself as sole stockholder of the lessors. Suppose the Illinois Central should refuse to pay the annual rental provided in the Cairo bridge lease, and the Chicago, St. Louis and New Orleans Railroad Company should bring suit, recover a judgment for $180,000, and collect it from the Illinois Central, where would the money go? Every dollar would go back into the treasury of the Illinois Central. The entire transaction, under these pretended leases, amounts to simply this, the Illinois Central takes money out of its treasury with one hand and puts it back with the other. Whether the rental is paid or not makes no difference either to the lessor or to the lessee. In either case, at the end of the year, the result to both is precisely the same.

The only interest affected or intended to be affected by these paper transactions was the interest of the state. The only purpose of these transactions was to enable defendant to do indirectly what it could not do directly.

Counsel say, even if it were true that the Illinois Central owns all of the capital stock of the Dunleith and Dubuque Bridge Company and all of the capital stock and outstanding bonds of the Chicago, St. Louis and New Orleans Railroad Company, the Illinois Central is neither the legal nor equitable owner of these bridges; that ownership of the property of a corporation cannot be acquired through ownership of the capital stock. This may be true in a technical and refined sense, but it is not in any practical sense. The owner of all the capital stock of a corporation controls absolutely the corporate property, enjoys all the benefits accruing therefrom, and in everything that ownership implies, is as much the real owner as though he possessed a warranty deed.

The Illinois Central, as the sole owner of the capital stock of the Chicago, St. Louis and New Orleans Railroad Company, not only enjoys all the profits derived from the Cairo bridge, but in everything, except a mere fiction, is the sole proprietor of this bridge. The Illinois Central can repudiate the lease tomorrow,

refuse to pay the rent, continue to use the bridge, put all the earnings into its own treasury, and the Chicago, St. Louis and New Orleans Railroad Company, the pretended owner and lessor, can never utter a protest unless it is voiced by the Illinois Central. Under such conditions, to say that the Chicago, St. Louis and New Orleans Railroad Company is the owner of the bridge, that this lease binds the state and the Illinois Central can treat itself as an independent bridge company, sounds like ironical fiction.

Under the fiduciary relation which here exists, and appellee's brief will be searched in vain for a denial of such relation, in view of the duty resting upon defendant, to treat the state with the utmost candor and good faith, in view of the fact that in the transactions involving these bridges the Illinois Central dealt with itself through dummy corporations which it owned and controlled, these bridge leases, as affecting the state, are absolutely void. The true situation is precisely the same as though the Illinois Central had built these bridges in its own name, operated them in its own name, collected the arbitraries in its own name, and put them directly into its own treasury. If the Illinois Central, as the owner of these bridges, cannot deduct these bridge arbitraries in its own name, it cannot deduct them in the name of a dummy. If these bridge arbitraries cannot be deducted directly *by* the Illinois Central, they cannot be deducted indirectly *for* the Illinois Central.

The whole question resolves itself into this: Can the Illinois Central, as the real owner of these bridges, and for its own benefit, deduct bridge arbitraries from the gross receipts of the charter lines and avoid the payment of a per centum thereon? If it can, the demurrer to this claim should be sustained. If it cannot, the demurrer must be overruled.

Counsel say, the Cairo bridge cost over three million dollars; that it spans the Ohio river, a natural barrier between the north and south; that the expenses of maintaining this bridge are enormous; that bridges of this character are never treated as ordinary railroad mileage by the Interstate Commerce Commission, but an allowance is made for their maintenance and use. They say, furthermore, this bridge was constructed under a Kentucky charter, which authorized the collection of tolls; that the arbitraries deducted were reasonable charges and amounted to nothing more than a fair return upon the capital invested, or ordinary rental for the use of the bridge.

Whether or not these contentions are true is wholly immaterial. Neither the cost of the bridge, the character of the bridge, the location of the bridge, nor the expense of its maintenance, affects the question of the right of defendant to deduct bridge arbitraries from the charter line receipts. While the state of Kentucky could authorize the collection of tolls for the use of that part of the bridge within its own territory, neither the state of Kentucky, nor any other power, could authorize defendant to deduct these tolls, either in whole or in part, from the gross receipts of the charter lines.

If the Illinois Central can deduct bridge arbitraries from receipts derived from joint traffic which crosses the Cairo bridge, and apportion the remainder of these receipts between the charter and the non-charter lines, which means to deduct a part of these arbitraries from charter line receipts, it can do the same thing as to every other bridge upon its non-charter lines. All the defendant will have to do is organize a bridge company, subscribe for the stock, turn over the bridge and take a lease back, deduct a bridge arbitrary, as lessee, from the gross receipts of all joint traffic which crosses the bridge, and divide what is left of the joint receipts between the charter and the non-charter lines. By extending the scheme which is now applied to the Cairo and Dubuque bridges, the expense of maintaining every culvert and bridge upon all of the defendant's non-charter lines, can be deducted in part from the gross receipts of the charter lines.

If defendant, as the owner of the Cairo bridge, can deduct bridge arbitraries for and on account of its maintenance or use from the charter line receipts, it can do the same thing with the bridge at La Salle. The bridge at La Salle spans the Illinois river, a natural barrier. It is over a mile long. It cost a large amount. The expenses of maintenance are heavy. Under the rule of the Interstate Commerce Commission, it would not be treated as ordinary track. If defendant, as the *owner* of the Cairo bridge, can deduct bridge arbitraries from charter line receipts and pay no per centum to the state thereon, why not, as the owner of the La Salle bridge? What difference does it make that one bridge is near Cairo and the other is near La Salle? What difference does it make that a part of one bridge is in the state of Kentucky, upon a non-charter line, and the other is in Illinois, upon a charter line? The thing done in each case would be precisely the same. The result in each case would be precisely

the same, namely, to minimize the amount of charter line receipts, by which the per centum of the state is measured.

Counsel say, in the case of the La Salle bridge, if an arbitrary were deducted, it would make no difference, because the state would receive a per centum upon the bridge earning. This is begging the question and requires no answer.

Under the charter, the state is entitled to a per centum upon the *gross or total receipts* derived from the charter lines. Until the per centum of the state is measured, nothing can be deducted from the *gross* receipts, for bridge expenses, bridge arbitraries, bridge rentals, or bridge use, either directly or under any pretense. And this is true, regardless of the character of the bridge, where it is located, how it is built, or under what authority.

Counsel undertake to argue that these bridge arbitraries are not deducted from the gross receipts of the charter lines, but are parts of the through rate allotted to a distinct and independent portion of the route; that the charter lines constitute one part of the through route, the Cairo bridge constitutes another, and the non-charter lines constitute another; that the through rate is distributed between these parts on a basis understood when the rate was made, that the portion allotted to each part should represent the earnings of that part. In other words, that in making the through rate, the Cairo bridge is considered as a bridge structure, and a definite part of the through rate, to-wit, two cents a hundred is allotted to it as a bridge earning. It seems a little strange that in every instance, regardless of the length of the route or the amount of the rate, the Cairo bridge is allotted exactly two cents. But it is not worth while to undertake to solve the mysteries of this allotment.

This argument is based upon assumptions which the bill avers and the demurrers admit are not true. The bill avers that in making rates between points north and south of the Ohio river, the bridge arbitraries are not considered; that the Cairo bridge is treated and considered precisely the same as a like mileage on any other part of defendant's system, *and no greater or higher rate is made on account thereof*. Under this averment, no part of the rate is allotted the Cairo bridge as a distinct part of the route, because the bridge is not treated as a distinct structure, but as ordinary mileage.

The bill avers that these bridge arbitraries were deducted from the total receipts derived from traffic which crossed the bridge before the receipts were apportioned between the charter

and the non-charter lines; that one-half of these arbitraries was deducted from the gross receipts of the charter lines and no per centum was paid thereon. The same averments are made as to the Dubuque bridge. In the face of these facts, which are admitted by the demurrers, what becomes of a contention based upon the theory that these bridge arbitraries were not deducted from the charter line receipts?

The defendant, by its own act, admits that nearly two million dollars, in bridge arbitraries, were wrongfully deducted from the charter line receipts on account of the Dubuque bridge.

As heretofore shown, the annual rental provided in the pretended lease from the Dunleith and Dubuque Bridge Company to the Illinois Central was $150,000. Up to 1899, the Illinois Central deducted, annually, in bridge arbitraries, from the through rates, only the sum of $150,000, the annual rental provided in the pretended lease. Then it occurred to the officers of the Illinois Central that if the state would stand for an annual deduction of $150,000, it would stand for more, and they proceeded to deduct from the through rates, without limit, two cents for each one hundred pounds of freight and twenty-five cents for each passenger which crossed the Dubuque bridge.

From November 30, 1899, to October 31, 1905—a period of six years—the total arbitraries deducted from the through rates, for the use of this bridge, amounted to $2,861,392.78, or nearly two million dollars more than the total annual rental provided in the pretended lease. One-half of these arbitraries was deducted from the gross receipts of the charter lines, and upon this amount no per centum was paid the state.

The investigation of defendant's account was begun by the governor in the fall of 1905. In November of that year, the defendant returned to its former practice, and proceeded to deduct, in bridge arbitraries, only a hundred and fifty thousand, the annual rental provided in the lease, and account to the state for the arbitraries deducted in excess of this amount.

In other words, the defendant, by its own act, admitted that a part of the Dubuque bridge belonged to the charter lines; that the arbitraries deducted, for the use of the bridge, over and above the annual rental provided in the lease, belonged in part to the charter lines as part owner of the Dubuque bridge, and that upon the charter line's share of these bridge arbitraries the state was entitled to a per centum. For this reason, in its semi-annual statements, it accounted, or pretended to account, for the state's

share of all the arbitraries or tolls in excess of the rental provided in the lease.

Will your honors kindly turn to exhibit "59", on abstract page 323? The period covered by this statement begins November 1, 1905. The last item above the total is as follows: "Proportion of freight tolls over Dubuque bridge in excess of $150,000 per annum." Then follow the monthly amounts which aggregate $85,520.

Take exhibit "60" on the following page. You find the same item. The total bridge arbitraries or bridge tolls upon which the state received a per centum during this semi-annual period was $75,245.64.

During the year covered by these two semi-annual statements, to-wit, the year beginning November 1, 1905—after this investigation had begun—the total amount of bridge arbitraries or bridge tolls deducted from traffic which crossed the Dubuque bridge, as against the state, was $150,000, the annual rental provided in the lease.

If, during the year covered by these statements, the Illinois Central, as against the state, was entitled to deduct, in bridge arbitraries, only an amount sufficient to pay the rental provided in the lease, upon what theory was it entitled to deduct, in bridge arbitraries, from 1899 to 1905, two million dollars more than the total annual rental so provided? No answer will be found in appellee's brief, because there is none. Furthermore, if the Illinois Central, as against the state, was only entitled to deduct, in bridge arbitraries, an amount sufficient to pay the annual rental provided in the Dubuque bridge lease, upon what theory was it entitled to deduct, in bridge arbitraries, eleven million dollars more than the total annual rental provided in the Cairo bridge lease?

This brings me to the second contention urged by the state. This contention is that if these bridge leases be held valid and binding upon the state, and the Illinois Central, as lessee of these bridges, is entitled to deduct bridge arbitraries or tolls on account of their use, that these arbitraries or tolls are simply bridge earnings, and a portion of these earnings must be credited to the charter lines because a part of these bridges belong to the charter lines. In other words, that since the bridges, in part, belong to the charter lines, a part of the earnings derived from the bridges is drawn to the charter lines. As to the Dubuque bridge, this

contention is admitted by defendant's own acts. As to the Cairo bridge, it is strenuously denied.

Counsel say this contention is urged because the state recognizes the uncertain and dubious character of its other contention. If any satisfaction can be derived from this sort of a statement, so far as I am concerned, counsel are welcome to it. While my associates, as well as myself, firmly believe that the first contention urged is absolutely sound and the reasons to support it will appeal to this court; while we are convinced beyond any doubt that these bridge leases are simply devices to cheat and defraud the state; while, to us, it is clear as day that under this charter not one dollar of bridge arbitraries, bridge rentals, bridge expenses, nor any other expenses, can be deducted from the gross receipts of these charter lines, until the per centum of the state is measured, we lay no claims to infallibility. We recognize the fact that mistaken judgment is a possibility. And because we do, we deem it our duty to present to the court any and all contentions which, under any circumstances, might affect the state's revenue. And for this course we offer no apologies.

Counsel say the Illinois approach is simply a connection between the charter lines and the Cairo bridge and is no part of the Cairo bridge; that the bill avers the arbitraries are deducted for the use of the "Cairo bridge," and not for the use of the approaches; that since the Illinois approach is no part of the bridge, the charter lines are entitled to no part of the arbitraries or bridge earnings.

Their theory is that the Cairo bridge, which renders the entire service for which an earning is charged, consists of the steel and iron frame work which spans the Ohio river proper. This steel and iron framework rests upon piers and is 104 feet above low water mark. At the point where it ends and the Illinois approach begins, this steel and iron framework is nearly a hundred feet above the ground. Without the Illinois approach, this steel and iron framework, set up in the air, would no more be a bridge than would the statue of liberty. Without this approach, it wouldn't earn a dollar in a thousand years. A mountain goat couldn't reach it. The only thing that could cross it would be a bird. And yet they tell us the Illinois approach is no part of the Cairo bridge.

The bill avers that the Illinois approach is an integral part of the bridge and has been so treated and considered by defendant.

Many cases are cited in our brief which squarely and directly hold that a bridge approach is an integral part of the bridge itself. Counsel say that in all these cases both the bridge and the approach were in the same state and were authorized by a single license. What difference does it make *as to the character of a structure*, under what authority it is built, or whether it is located in one state or in two states. You might as well say the the Dubuque bridge is not one bridge because half of it is in Illinois and half is in Iowa, or because half of it was built under an Illinois charter and the other half under an Iowa charter.

In State Board of Equalization v. The People, 229 Ill., 430, this court held that the Illinois approach was a part of the charter lines. If this approach is an integral part of the Cairo bridge, as the bill avers and the facts disclosed conclusively show, a part of this bridge belongs to the charter lines, and, in any event, a part of the arbitraries deducted for its use must be credited to the charter lines.

RENTALS FROM MOBILE AND OHIO RAILROAD.

Paragraphs 95 to 98, inclusive, relate to rentals received from the Mobile and Ohio Railroad. They aver, in substance, that defendant leased to the Mobile and Ohio Railroad Company certain charter line facilities in the city of Cairo, and also the use of the Cairo bridge, and received therefor, in rentals, from 1898 to 1906, over one million dollars, no part of which rentals was ever included in defendant's account of charter line receipts.

JOINT EARNINGS.

Paragraphs 110 to 135, inclusive, relate to the division of joint earnings between the charter and non-charter lines. If any one question in this lawsuit is bigger than the others, *this* is probably the one. The real merits of this question, however, are not now at issue. When that issue is made, the state will meet it. The inquiry, and the sole inquiry, here is, are the facts averred in these paragraphs, which the demurrers admit, sufficient in law to make a *prima facie* case.

Paragraph 110 avers, in substance, that for many years a large part of the gross receipts derived by defendant from the operation of its system has been, and still is, derived from the carriage of freight, passengers, mail and express from stations

on its charter lines to stations on its non-charter lines, and from stations on its non-charter lines to stations on its charter lines, and to and from points on other lines connected therewith; that it was and still is the duty of defendant to so divide the receipts produced jointly by the charter and the non-charter lines as to yield to the charter lines their due and just share thereof, to the end that the state may receive its per centum upon all the gross proceeds, receipts or income derived from the charter lines. That this *is* the duty resting upon defendant, under its charter, is too plain for discussion.

This duty, to use an illustration, means simply this: If I travel from Springfield to Chicago over the Illinois Central (and do not have a pass), I buy one ticket for the entire passage. For this ticket I pay the company, at two cents a mile, $3.86. In making the trip, I travel from Springfield to Gilman, a distance of 112 miles, over a non-charter line, and from Gilman to Chicago, a distance of 81 miles, over a charter line. The $3.86 received by the company for my ticket is the joint earning of a charter and a non-charter line. The state is entitled to a per centum upon the charter line's part of this $3.86, and it is the duty of defendant to fairly apportion this $3.86 between the charter and the non-charter lines, and in its *account* credit to the charter line its full and fair share thereof, in order that the state may receive the per centum to which it is entitled under the charter. And what is true of this joint earning is true of every other, both passenger and freight. No complaint is made in the bill as to the division of joint passenger earnings.

MILEAGE BASIS LEGAL RULE.

Paragraph 111 avers, in substance, that it was and is the duty of defendant to divide said joint earnings according to some fair and equitable basis, and the only fair, equitable and practicable method of division is according to mileage, or what is called a "mileage basis." A mileage basis simply means that the part of the joint earnings allowed any line is determined by the number of miles the traffic actually moves on such line.

For instance, suppose a car of freight is hauled by the Illinois Central from Springfield to Chicago, for which service it charges and receives $19.30. The non-charter line haul from Springfield to Gilman is 112 miles. The charter line haul from Gilman to Chicago is 81 miles. The total or joint haul from Springfield

to Chicago, is 193 miles. Under the mileage basis, the $19.30 is divided as follows: 112/193, or $11.20, is credited to the non-charter line, and 81/193, or $8.10, is credited to the charter line; in other words, for performing this joint service, the charter line is allowed precisely the same amount, per mile of haul, as the non-charter line. Wherever the term "mileage basis" or "mileage pro rate" is used in this bill or during this argument, it means this and nothing else.

The position of the state is, that where special facts and circumstances, which would render the mileage basis inequitable or unfair, are not alleged and proved, the fair and equitable method, and the only fair and equitable method, of dividing joint earnings is according to mileage; in other words, as a matter of law, the mileage basis is *prima facie* the fair and equitable method of dividing joint earnings, and must be applied. This precise question has only been passed upon by the courts in one or two cases. The reason doubtless is, the proposition is so plain, it has seldom been questioned.

In the case of Ackley v. The Chicago, Milwaukee and St. Paul Railway, 36 Wis., 252, the court had under consideration the statute of Wisconsin of 1874. This statute fixed the maximum charge of a joint haul by two or more railroads, but made no provision as to how the maximum charge should be divided between the different roads. The court said:

"We are of the opinion that $15 per car load is the highest rate of freight that can lawfully be demanded for the whole carriage, and that the same should be divided between the two railway companies on some *equitable principle*, to be determined by the court, in case the companies invoke the aid of the courts in the premises."

Subsequently the supreme court of Wisconsin announced and declared what the *equitable principle* of division, referred to in the Ackley case, was.

In Rood v. Chicago, Milwaukee and St. Paul Railway, 43 Wis., 146, the court said:

"It is also proper to say that the *equitable principle* of division between railway companies, under the statute of 1874, where two or more companies carried goods over their own roads as one carriage, intended by the court in Ackley v. Railway Company, 36 Wis., 252, *was* the distribution *pro rata* of the aggregate rates of the statute, according to the length of carriage by each company. As between themselves, the companies could agree upon

any other rule of distribution. *But this was adopted as the legal rule.*"

The doctrine announced in this case is, that where special circumstances, evidenced by contract or otherwise, are not alleged and proved, the *mileage basis* is the *equitable basis* and constitutes the legal rule for dividing joint earnings. And I challenge defendant's counsel to produce a single case which, when fully read and fairly understood, questions the doctrine here announced.

Suppose the Illinois Central receives a car of freight at Springfield consigned to Moline. The Illinois Central hauls the car to Peoria, over it own line, and there delivers it to the Rock Island Railroad. The Rock Island hauls the car over its line to Moline, delivers the freight to the consignee, collects, by request of the Illinois Central, the usual and legal charges for the entire haul, and refuses to settle with the Illinois Central.

The Illinois Central sues the Rock Island under the common counts, and the Rock Island files the general issue. The trial comes on and a jury is waived. The Illinois Central proves it hauled the car from Springfield to Peoria, a distance of eighty miles, and there delivered it to the Rock Island; that the Rock Island hauled the car from Peoria to Moline, a distance of ninety-four miles, delivered the car to the consignee, and under the usual custom of railroads, and by request of the plaintiff, collected the charges for the entire haul, which were $20. Thereupon the plaintiff rests and defendant offers no testimony.

Under such proof, will any one doubt that any court in the land would render judgment for the Illinois Central for such proportion of the $20 as the length of the haul from Springfield to Peoria bears to the length of the entire haul from Springfield to Moline? The reason it would is, that when special circumstances do not exist, the mileage basis is the *equitable* and the legal method of dividing joint earnings.

I shall, therefore, treat one proposition as settled, namely, that where special facts and circumstances, which would render the mileage basis inequitable or unfair, are not averred and proved, the *mileage basis* is the legal rule for dividing joint earnings, and must be applied.

MILEAGE BASIS RECOGNIZED BY DEFENDANT.

The leases set up in the bill conclusively show that before the Illinois Central became the owner of these non-charter lines, it recognized fully the fairness of the mileage basis. The lines west of the Mississippi, which now comprise the western division of defendant's system, were formerly leased and operated by defendant. One of these lines was leased to defendant in 1867 by the Dubuque and Sioux City Railroad Company. The lease is set out in the bill.

When this lease was made, the Iowa lines were owned absolutely by the Dubuque and Sioux City Railroad Company, and the Illinois Central had no interest whatever in this company. In making this lease, the parties stood at arm's length. The rental was based upon the gross earnings of the leased lines. The division of joint earnings was, therefore, of the utmost importance. Under *such* circumstances, the lease provided that all the joint earnings of these leased lines and defendant's charter lines should be divided *according to mileage*, and they were so divided up to 1887.

Shortly prior to the expiration of this lease, the Illinois Central began purchasing the capital stock of the Dubuque and Sioux City Railroad Company, for the purpose of acquiring control. Then it dawned upon the management of the Illinois Central that a division of the joint earnings of the charter lines and its leased lines west of the Mississippi, upon a mileage basis, was not quite fair to the leased lines. And so in the subsequent leases, provisions were inserted more favorable to the leased lines. A few years later, defendant acquired substantially all of the capital stock of the Dubuque and Sioux City Railroad Company, namely, 78,973 shares out of a total of 80,000 shares, and thereby became, to every intent and purpose, the owner of these leased lines.

Defendant's counsel say: "The ownership of a majority of the stock in the Dubuque and Sioux City Railroad Company did not make defendant that company nor the owner of its property." This is true in a technical sense. But it is not true in a court of equity, which looks through forms and behind technicalities.

When defendant acquired ninety-eight and three-fourths per cent of the capital stock of the Dubuque and Sioux City Railroad Company, it became the owner of the property, rights and franchises of that company in everything that ownership implies. From this time on, it exercised every power incident

to absolute ownership. After defendant became the owner of these leased lines, it was no longer necessary to keep a separate account of their earnings, except to protect the minority stockholders of the Dubuque and Sioux City Railroad Company, and they all together owned less than one and one-fourth per cent of the capital stock. Of course, these minority stockholders had rights. So has a lamb when he sleeps by a lion.

Upon the earnings of these leased lines, no per centum was due the state. From this time on, in dividing the joint earnings of the charter lines and the leased lines west of the Mississippi, which defendant then owned, every dollar of earnings taken from the charter lines and given to the earnings of the leased lines meant a saving to defendant of at least seven cents. Then it was defendant concluded that to divide the joint earnings of the charter lines and the leased lines west of the Mississippi, upon a mileage basis, was wrong in principle and vicious in practice. The result was that the *mileage basis*, the method of division provided in the original lease, was abandoned, and in lieu thereof were substituted the unfair, unequal and dishonest methods set out in the bill.

It may be said it does not follow that a mileage basis is fair *now* because it was fair thirty years ago; that conditions have changed, and with these changes new methods were essential. Conditions have changed, but where and how? In thirty years, not a mile has been added to the charter lines, except the mileage of the Cairo bridge. The changes resulting from extension, growth and increased population have all occurred in the non-charter lines. Every non-charter line west of the Mississippi, compared with the charter lines, is stronger today than it was thirty years ago, and everybody knows it. Under such circumstances, to say that in the division of joint earnings, these non-charter lines, in order to live, must be given false and fictitious mileage, and allotted a share out of all proportion to the service rendered, will not appeal to any court.

NO REASONS FOR NOT APPLYING MILEAGE BASIS.

Paragraph 134 avers, in substance, *that no special circumstances exist with reference to any of the non-charter lines which would make it fair, just and equitable to divide the joint earnings on any other basis than according to mileage.*

Counsel say this averment is merely a conclusion and might as well have been omitted; that no issue can be joined on such a declaration; "that *what are special circumstances* cannot be known until you know the facts on which you join issue;" that this averment may be a truth, but is not the fact from which the truth is gathered and is not admissible as a substitute for the averment of the fact. The distinction between *fact* and *truth* was drawn by Judge Gary in a gambling case (44 App., 203), where the declaration averred that certain acts constituted gambling. Judge Gary said:

"Without more knowledge than the members of this court possess of the various devices for gambling, that averment seems inconsistent with the facts alleged, and a bare averment of a conclusion is not good pleading. Facts from which the court can see that the conclusion follows should be stated."

Nobody questions the rule there announced, but it does not apply to this averment.

If no facts and circumstances exist which render the mileage basis inequitable or unfair, what else can you do but so aver, if any averment at all is needed? An averment that certain facts, the non-existence of which are essential to plaintiff's case, *do not exist*, is the averment of an issuable fact, and this court has so held. Furthermore, where the subject matter of such negative averment lies peculiarly within the knowledge of defendant, the burden of proof, in that regard, rests with defendant. (121 Ill., 90.)

Under the averment of this paragraph, defendant's counsel will have no difficulty in formulating an issue of fact, if they want such an issue. If it be true, as they insist, that facts and circumstances exist which render the mileage basis, as applied to the charter and non-charter lines, inequitable and unfair, let them answer the bill and set up the facts. When they do, the state will meet them.

Furthermore, without the averment in paragraph 134, *that no special circumstances exist*, the bill is good. The mileage basis, being *prima facie* the legal rule for dividing joint earnings, the only averments necessary are: that joint earnings were received by defendant; that the mileage basis was not applied and loss occurred by reason thereof. Under such averments, it follows, as a presumption of law, that the mileage basis—the legal rule—should have been applied. If facts exist which destroy this presumption, the defendant must plead them.

Paragraph 110 avers that joint earnings were received by defendant from the charter and non-charter lines, and paragraph 111 avers they were not divided according to mileage, by reason whereof the state was deprived of large sums of money to which it was entitled under the charter.

METHODS PRACTICED NOT DISCLOSED IN SEMI-ANNUAL STATEMENTS.

Paragraphs 112 to 134, inclusive, set out in detail the various methods of division practiced by defendant, and aver that because of the substitution of these methods for the mileage basis, the charter line earnings have been fraudulently minimized and millions of revenue lost to the state.

Defendant's counsel insist the state is entitled to no relief, even if it be true that the methods of division set out in these paragraphs *were* inequitable and unfair.

Their argument, in substance, is that these methods have been practiced by the defendant for thirty years; that during all this time semi-annual statements have been made to the governors; that the bill does not aver the governors did *not* know of these methods; that there is no provision in the charter nor in the statute requiring the joint earnings of the charter and the non-charter lines to be divided upon any given basis, and hence a basis of division may be established by usage or practical construction; that the acts of the various governors in approving these semi annual statements, or accepting them without objection, amounted to a *determination* that the methods practiced fully complied with the requirements of the charter; that this determination by the governors binds the state and absolutely precludes it from now substituting the mileage basis or any other basis for the methods approved by the various governors.

I shall later discuss these semi-annual statements and the right of the governor to determine what constitutes performance of defendant's charter obligations. I will only stop now to say that counsel's entire argument is based upon the assumption that the governors had full knowledge of the methods of division practiced by defendant. The facts averred in the bill, which are admitted by these demurrers, warrant no such assumption.

While the bill contains no express averment that the governors did *not* know of the methods of division practiced by defend-

ant, it does aver facts from which no other conclusion is warranted.

Paragraph 162 avers, in substance, that while it appears from the endorsements made upon some of the semi-annual statements, that they were examined by the governors, in truth and in fact, prior to 1905, not one of these semi-annual statements was ever verified; that none of the governors ever made an examination of the books, papers, officers or agents of defendant for the purpose of verifying and ascertaining the accuracy of the account.

The charter empowers the governor to examine defendant's books for one purpose only, namely, to verify and ascertain the accuracy of the account. Except to accomplish this purpose, the governor has no right whatever to examine the books. The averment, that none of the governors ever examined defendant's books for the purpose of verifying the accuracy of the account—the only purpose for which an examination could lawfully be made—is, in legal effect, an averment that no examination was ever made.

Under the facts averred in the bill, the only knowledge the governors had, or could have had, as to methods of division employed by defendant was that contained in these semi-annual statements. And I challenge defendant's counsel to take up any one of these semi-annual statements or alleged copies of the account, from 1877 to the present time, and show, by anything there contained, upon what basis, or according to what method, or in what manner the joint earnings of a charter and a non-charter line were ever apportioned or divided.

Will your honors kindly turn to one of these semi-annual statements? It makes no difference which one you examine. Take any one of the exhibits, from abstract page 267 to abstract page 325.

What is there in these statements which affords even a clue to the methods employed in dividing joint earnings? Absolutely nothing. The non-charter lines are wholly ignored. Joint earnings are not mentioned. There is nothing to show there were any. No traffic expert, however skilled, can take one of these semi-annual statements and by any possibility determine or figure out what methods were used in dividing joint earnings, or whether they were ever divided at all.

To say, when a governor approved one of these semi-annual statements, if he ever did, he thereby *determined* that methods of division, not disclosed, and of which he knew nothing, amount-

ed to a performance of defendant's obligation, and this determination binds the state, is a proposition of law never before asserted and probably never will be again.

MILEAGE BASIS APPLIES IN ABSENCE OF SPECIAL CIRCUMSTANCES.

Another objection—and in fact the principal objection—to the application of the mileage basis is, that no facts and circumstances are alleged in the bill from which the court can determine that the mileage basis is equitable and fair as applied to the charter and the non-charter lines.

Counsel say, in their brief:

"The bill does not aver any circumstance pertinent to this inquiry. The state bases its claim upon the averment that the mileage basis is the only fair basis. Such an averment is an opinion or conclusion not admitted by the demurrer."

Whether or not this averment is a conclusion is not material. Whether or not the demurrers admit it is not material. In the absence of special circumstances, and the bill avers that none exist, the mileage basis is the legal method of dividing joint earnings and must be applied.

Counsel further say:

"In determining what is a proper adjustment of rates as between the different portions of the system, every case must depend upon its own circumstances. There are certain elements, varying with the different lines, which must be considered in arriving at a just division of a through rate. Among the elements which must be considered before it can be said that any method is equitable and fair in a given case are: the expense of handling the business, the length of the haul, the density of the traffic, the reasonable return to each line, and other elements."

Their argument means, there is no method of division known to the law which *prima facie* is equitable and fair. It means, there is no legal rule for dividing joint earnings. It means, if the Illinois Central makes a joint haul with the C. B. & Q., and the C. B. & Q. collects the charge for the joint service and refuses to account, and the Illinois Central goes into court, proves the length of the joint haul, the length of the haul by each road, and the amount collected for the joint service, and the C. B. & Q. makes no defense, the Illinois Central can have no judgment.

There never was and never will be a rule of law which works this result.

We do not claim the mileage basis is an arbitrary rule. What we claim, and all we claim, is that where joint earnings have accrued, in the absence of special contract or circumstances showing inequalities which affect division, the mileage basis is the equitable and legal method and must be applied.

The bill avers that millions of dollars were received by defendant for and on account of traffic which moved partly over the charter and partly over the non-charter lines. All of these lines are owned or controlled by defendant, and are operated as a single system. No circumstances are disclosed by the bill showing, or tending to show, that the situation is such, either as to the lines themselves or their operation, as to render the mileage basis—the legal rule—inequitable or unfair. On the contrary, the bill expressly avers that no *circumstances exist with reference to any of the non-charter lines which would make it fair, just and equitable to divide the joint earnings on any other basis than according to mileage.*

If this averment is not true; if, as counsel insist, the cost of constructing the non-charter lines exceeded that of the charter lines; if, as compared with the charter lines, the hauls on the non-charter lines are shorter, operating expenses are higher, the cost of maintenance is greater and traffic is less dense, these are matters of defense, and under the rules which govern pleading they must answer the bill and aver these facts. They cannot demur and simply assert them.

RATE CASES.

Counsel assume the same facts must be known to divide a joint earning as must be known to establish a rate. They say, in their brief:

"There is no distinction between the factors entering into the ascertainment of the just share of joint earnings to be allotted to a given line or part of a system and those by which reasonable rates for such line or part are established."

No authorities are cited in support of this contention. They simply say, any other contention is absurd. Thereupon they cite numerous cases to show that before a rate can be fixed, certain factors must be known. Then they say, since these cases apply to the division of joint earnings as well as to the making

of rates, there is and can be no *legal rule* for dividing joint earnings.

It does not follow, because certain facts must be known in order to fix a rate, which must be reasonable to be a rate, that in dividing joint earnings already accrued, there is no method which is *prima facie* fair. And the cases cited do not so hold. I cannot take time to review these cases, and it answers no purpose to cull here and there an isolated phrase. These cases must be read, not partially, but fully. What the courts said must be viewed in the light of what the courts were considering, and in nearly all of these cases the courts were considering, not the division of joint earnings already accrued, but the making of rates.

The doctrine announced in these cases is, that a railroad is entitled to a fair return on its capital invested; that state legislatures and railroad commissions, both state and interstate, in regulating rates, must keep this in view; that in determining whether a rate is reasonable, the cost of construction, the value of the improvements, the expenses of operation, the length of the hauls, and the density of traffic must all be considered. But not one of these cases conflicts with the rule announced by the supreme court of Wisconsin, namely, that where joint earnings have accrued, in the absence of a contract or proof of special facts, the mileage basis is the legal rule of division and must be applied. And this is all for which we contend.

HAULS ON DEFENDANT'S SYSTEM.

Counsel insist the map of defendant's system shows that the average haul on the charter lines is a *long haul*, and the average haul on the non-charter lines is a *short haul*, and, therefore, the bill itself discloses a fact which renders the mileage basis inequitable and unfair. This would be important if true. But the map itself warrants no such assumption. Will your honors again turn to this map? It follows abstract page 266.

It is true, some of the branches in Illinois (the branches in green) are shorter than either of the charter lines, and a joint haul over the entire length of a charter line and one of these Illinois branches would be much longer over the charter line. But as a matter of fact, there *are* no such hauls.

Between what points on defendant's system, or on any other system, does the great bulk of the traffic move? It moves

between the large cities located *on* the system. It moves between the distributing centers. How are the large cities and distributing centers upon defendant's system located with reference to the movement of joint traffic over these charter and non-charter lines?

The large cities on the north and northwest are Chicago, Madison, Dubuque, Sioux Falls, Sioux City, Omaha and Council Bluffs. The large cities on the south are St. Louis, Cairo, Nashville, Memphis, Jackson and New Orleans. In the movement of traffic between these large cities and distributing centers, in nearly every instance, the long hauls are over the *non-charter* lines.

Take traffic moving from Chicago to Dubuque. It moves from Chicago to Freeport, a distance of 114 miles, over a *non-charter* line, and from Freeport to Dubuque, a distance of only 69 miles, over a *charter* line.

Take traffic moving between Chicago and Omaha. It moves from Chicago to Freeport over a *non-charter* line, from Freeport to Dubuque over a *charter* line, and from Dubuque to Omaha over a *non-charter* line. In other words, when traffic moves between Chicago and Omaha, the *charter* line haul is 69 miles and the *non-charter* line haul is 447 miles. Whenever traffic moves between Chicago and points west of the Mississippi, the *non charter* line haul is not only the longer, but in nearly every case is many times the longer.

Take traffic moving between Chicago and St. Louis. It moves from Chicago to Gilman over a *charter* line, and from Gilman to St. Louis over a *non-charter* line. In other words, in the movement of all traffic over defendant's system, between the two great distributing centers of the middle west, the *charte* line haul is 81 miles and the *non-charter* line haul is 212 miles.

Take traffic moving from St. Louis to Cairo, the southern terminus of the charter lines. By the most direct route this traffic moves from St. Louis to Carbondale, a distance of 94 miles, over a *non-charter* line, and from Carbondale to Cairo, a distance of 57 miles, over a *charter* line. Furthermore, as your honors will see by examining this map, it is not only possible, but practicable, to move all of this traffic by way of Mounds, and whenever so moved, the *charter* line haul is less than six miles.

Where traffic moves from Chicago or Dubuque, the northern termini of the charter lines, to New Orleans, the southern

terminus of the non-charter lines, or reversely, the long haul is over the *non-charter* lines.

Where traffic moves between Memphis and points on the *charter* lines, north of Centralia, the long haul is over the *charter* lines; but where traffic moves between St. Louis and points south of the Ohio river, the long haul, in every instance, is over the *non-charter* lines.

Where traffic moves between Chicago and Cairo, if honestly routed, it moves entirely over the charter lines, and there is no joint haul.

You can point out instances—and many of them—where the charter line haul is the long haul. No one disputes it. But a study of this map will conclusively show that in the movement of the great bulk of traffic over defendant's system, the non-charter line hauls are the long hauls.

It is, furthermore, insisted the map itself shows that the non-charter lines are mere feeders to the charter lines, and as a result traffic is more dense upon the charter lines. Counsel say, in their brief:

"An examination of the map will show that all the branches must finally deliver their traffic to the charter lines."

This is true of traffic, except from the northwest, which moves towards Chicago; but it is not true of traffic which moves the other way. They might as well have said:

"An examination of the map will show that all the charter lines must finally deliver their traffic to the non-charter lines."

One statement is just as true as the other.

Counsel further say:

"The non-charter lines are like the tributaries of a great river, each contributing its supply, until the main trunk moves a vast body to the final destination."

The tributaries of a great river flow only in one direction. The trains upon defendant's system run both ways. Traffic moves in all directions. When it moves one way, the non-charter lines feed the charter lines. When it moves the other, the charter lines feed the non-charter lines.

No circumstance is disclosed by this map concerning either the length of the hauls or the density of traffic, which affects the fairness of the mileage basis.

If it be true, as counsel frequently intimate, that the non charter lines were acquired by defendant for the sole purpose of feeding the charter lines and thereby increasing the state's

revenue; if it be true that the various governors knew of this philanthropic purpose, and in consideration thereof approved the methods practiced; if it furthermore be true that these facts constitute a defence, the thing to do is answer the bill and set them up.

DISHONEST SCHEMES OF DIVISION.

Paragraph 111 avers that since 1877 the defendant has failed and refused to divide the joint earnings of the charter and the non-charter lines according to the *mileage basis* or according to any other fair and equitable method, but has invariably so divided the said joint earnings as to yield to the charter lines much less than their just and true share thereof. The latter part of this paragraph may be a conclusion. But the paragraphs which follow are not conclusions. They aver facts which the demurrers admit.

Paragraphs 112 to 134 inclusive, set out the various methods and devices practiced by defendant in dividing the joint earnings. And I say here and now that no court in the land can read these paragraphs, and believe them, without concluding, beyond a doubt, that for years the Illinois Central Railroad Company has deliberately schemed to defraud the state.

Fifteen different examples of the methods of division practiced by defendant are set forth in these paragraphs. Counsel say:

"The rules are made as experience has shown the traffic to move, and should not be tested by selected illustrations; until the facts are known, the court cannot conclude that a particular illustration fairly represents the operation of the rule."

This is the only attempt made by defendant's counsel to justify the methods of division disclosed in these paragraphs. In view of the character of the methods, this is not surprising.

The examples given in these paragraphs are not selected from exceptional cases. They are examples of methods practiced generally in the different divisions of defendant's system. I can only take time to notice a few.

One of the schemes—in fact the star scheme—practiced by defendant, in milking the charter lines, has been the scheme of *constructive mileage*. *Constructive mileage* means *fictitious mileage* It means *padded mileage*. It means miles added, over which a haul was never made. In plain English, *constructive mileage* means *dishonest mileage*.

It avails nothing to say that in dividing joint earnings, constructive mileage has been common among railroads. So has rebating; so has stock-watering; so have other schemes which are going out of date. A dishonest method cannot be justified by any such argument.

Furthermore, unless the rights of the public intervene, two independent railroads can divide their joint earnings, either fairly or unfairly. The transaction concerns only themselves and their stockholders. Under this charter, the state of Illinois is entitled to a per centum upon all the gross earnings of the charter lines. What it receives, in the way of a per centum, largely depends upon and is measured by the methods of division applied to these joint earnings. Whatever other railroads may do or whatever this defendant may do, as concerning itself, as against the state, the methods applied in dividing these joint earnings must be absolutely fair.

The scheme of constructive mileage practiced by defendant is simply this: a non-charter line is arbitrarily divided into blocks of fifty miles, and each station within a block, regardless of how far the traffic moves to reach it, is given the entire mileage of the block, namely, fifty miles. The joint earnings are then divided upon the basis of *actual mileage* for the *charter* line, and *constructive mileage* for the *non-charter* line. In other words, in dividing the joint earnings, for the purpose of swelling the non-charter line's share, fictitious miles are added to the length of its haul.

To illustrate, the line from Chicago to Gilman is a *charter* line. The line from Gilman to Springfield is a *non-charter* line. Under the scheme of constructive mileage, the *non-charter* line from Gilman to Springfield is arbitrarily divided into blocks of fifty miles, commencing at Gilman. The first station west of Gilman is Ridgeville. Ridgeville is five miles from Gilman, and is, therefore, five miles within the first block. The second station is Thawville, which is nine miles from Gilman, and is, therefore, nine miles within the first block. A shipment is made from Chicago to Thawville, for which the company received $9. This shipment is moved from Chicago to Gilman, a distance of eighty-one miles, over a *charter* line, and from Gilman to Thawville, a distance of nine miles, over a *non-charter* line. In dividing this joint earning, the *non-charter* line is allowed, not nine miles, the actual distance from Gilman to Thawville, but fifty miles, the total distance of the block. The *charter* line is allowed

actual mileage, namely, eighty-one miles. The joint earning, which is $9, is divided as follows: $^{50}/_{131}$, or $3.43, is given the *non-charter* line, and $^{81}/_{131}$, or $5.57, is given the *charter* line. If actual mileage was allowed each line, in dividing this $9 earning, 90 cents would be given to the *non-charter* line and $8.10 to the *charter* line.

I have used these lines as an illustration, because your honors are familiar with them. No one will deny that the example given illustrates—and fairly illustrates—the principle of constructive mileage practiced by defendant. It may be said, in this example, the non-charter line haul is a very short haul, and on account of the expense of operation, a mileage basis would be unjust. If it was true that when the *charter line haul* was short, constructive mileage was allowed to the *charter* line and actual mileage to the *non-charter* line, there might be force in this contention. But this is *not* true. In the methods practiced by this defendant, no sauce is ever allowed the *gander.*

The bill avers that for the past five years constructive mileage has been applied to the non-charter lines west of the Mississippi. As heretofore shown, the bulk of the traffic west of the Mississippi moves between Chicago and Omaha, Council Bluffs, Sioux City and Sioux Falls. In every instance where this traffic begins or ends at Chicago, the *charter* line haul is the short haul, and in every instance constructive mileage is given the non-charter lines.

It would seem that to divide the joint earnings of the charter lines, and the non-charter lines west of the Mississippi, according to such a scheme, would sufficiently deplete the charter line's share, to satisfy the maw even of this defendant. But such is not the fact. The bill avers, and the demurrers admit, that upon all joint traffic moving between Chicago and points west of the Mississippi, thirty per cent of the joint earnings is *arbitrarily taken from* the lines *east* of the Mississippi and *given to* the lines *west* of the Mississippi. In every case, a part of this per centum is taken out of the charter line's share. When the volume of traffic which moves between Chicago and the Great Northwest is considered, and these methods are understood, one reason appears why the claims in this lawsuit aggregate millions.

Another method practiced by defendant, as set out in these paragraphs, is to allow the charter lines a proportion of the joint earnings, based on a through rate, and the non-charter lines a proportion, based on the local rates. Between competitive

points, every railroad fixes a through rate. It is compelled to do it to meet competition. The through rate is less than the sum of the local rates. For instance, Chicago and Springfield are competitive points. The Illinois Central has a through freight rate between these points. By billing a car from Chicago to Springfield, and taking advantage of this through rate, you pay less than you would by billing the car from Chicago to Gilman and rebilling it from Gilman to Springfield. In other words, the through rate fixed is less than the sum of the two local rates.

Through freight rates are fixed by the Illinois Central between New Orleans, Jackson, Memphis and other points south of the Ohio river, and Chicago.

The joint earnings of the charter and the non-charter lines south of the Ohio river are divided by apportioning the through rates. These through rates are not apportioned according to the principle of a rate pro rate or any other equitable principle. The *local* rate south of the Ohio river, which is more than the proportionate share of the through rate, is allowed the non-charter lines, and whatever is left of the through rate is given the charter lines.

Under this scheme, as shown by the bill, sixty-two per cent of the through rate from New Orleans to Chicago is apportioned to the *non-charter* lines, south of the Ohio, and thirty-eight per cent is apportioned to the *charter* lines north of the Ohio. The haul from New Orleans to Cairo, over the *non-charter* lines, is 558 miles. The haul from Cairo to Chicago, over the *charter* lines, is 365 miles. If the through rate was divided according to miles of haul, sixty per cent would be apportioned to the *non-charter* lines, and forty per cent, instead of thirty-eight per cent, to the *charter* lines. When it is remembered that every hour, day and night, these rates are applied to train-loads of freight and to monthly traffic which aggregates millions, the annual loss to the charter lines will be understood. In apportioning the rates between Chicago, and Jackson, Grenada, Martin, and other points south of the Ohio river, the schemes practiced are even worse.

The bill avers that many different methods of dividing the joint earnings between the charter lines and the non-charter lines in Illinois have been and are yet in vogue; that these methods have no uniformity, are governed by no fixed principles, are not applied to the different stations on the same line, and are frequently shifted from one branch to another. In some cases

constructive mileage is allowed the non-charter lines. In some cases a small amount of fictitious mileage is added to the *charter* lines and a large amount to the *non-charter* lines. In cases where freight originates on one *non-charter* line and is destined to points on another *non-charter* line, and is hauled over a connecting *charter* line, where the total haul is less than 101 miles, thirty per cent of the earnings is allowed each *non-charter* line, regardless of the haul on the connecting *charter* line. In cases where a *non-charter* line is the connecting link between two *charter* lines, and freight is hauled from a point on one *charter* line to a point on another *charter* line (except junction), a minimum allowance of *fifty miles* is made to the *non-charter* line and *twenty-five miles* to the *charter* lines, regardless of the actual hauls.

Nineteen actual examples are given showing how these methods work. I can only refer to one or two.

In the month of August, 1899, the total joint earnings on freight between Chicago and Thawville were $284.54. In dividing these joint earnings, the *charter* line, for an *eighty-one* mile haul, was given $133.92, and the *non-charter* line, for a *nine* mile haul, was given $150.62. In other words, the *non-charter* line, for a *nine* mile haul, was allowed $17 more than the *charter* line for an *eighty-one* mile haul. If the *non-charter* line haul had been a little shorter and the *charter* line haul had been a little longer, owing to the expenses of operation, the *non-charter* line would have taken it all.

In the month of August, 1899, the total earnings on joint traffic between Chicago and all of the stations on the Rantoul division were $9,566. Of these joint earnings, $3,601 were given the *charter* lines, and $5,965 were given the *non-charter* lines. In other words, only thirty-eight per cent of these joint earnings was allowed the *charter* lines. In every haul which contributed to these joint earnings, the *charter* line haul was 112 miles, and the *non-charter* line haul *in no instance* was more than 33 miles. In many cases it was less than 5 miles.

The nineteen examples given in these paragraphs were taken from a single month in the same year, thereby showing that all of these schemes were practiced at the same time throughout defendant's system. If the facts averred in these paragraphs are true—and the demurrers admit they are true—the fair and equitable, as well as the legal, method of dividing these joint earnings, has been supplanted by fraudulent and dishonest schemes. Through these schemes, earnings belonging to the

charter lines have been falsely credited to the non-charter lines. Upon these earnings, at least seven per centum was due the state. It has never been paid. And neither lapse of time, neglect of officials, equitable estoppel, practical construction, nor anything else, will bar the state from recovering its own.

In People v. Brown, 67 Ill., 438, this court, in discussing the doctrine of estoppel, said:

"It is a familiar doctrine, that the state is not embraced within the statute of limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at fearful hazard, should this doctrine be applicable to a state. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officers, forbids, the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government.

"The doctrine is well settled that no *laches* can be imputed to the government, and by the same reasoning which excuses it from *laches*, and on the same grounds, it should not be affected by the negligence or even wilfulness of any one of its officials."

CLAIMS ABANDONED.

Paragraph 135 relates to income from investments. The theory of this paragraph is, that defendant, instead of distributing the surplus earnings of the charter lines in dividends, invested these earnings in the stocks and bonds of other companies; that upon these investments it derives income, and, under the charter, should pay the state a per centum thereon.

When the original bill was filed, I believed this claim was meritorious. But, as Judge Dickinson said in the court below, "Since the first bill was filed, all of us have made a little progress." Possibly this court, after listening to the arguments and wading through the briefs, will finally conclude that none of us have made much. While the averments of this paragraph are probably sufficient to withstand the demurrers, in my opinion there is no merit in this claim.

And this is also true of the claims for a per centum of income derived from the building at 58 Michigan Avenue and the Chicago and Cairo elevators. These buildings are located upon de-

fendant's right of way, but are not used for railroad purposes, and, under the decisions of this court, are subject to general taxation. These claims are set out in paragraphs 142, 147 and 148.

EXPRESS EARNINGS.

Paragraph 136 relates to the division of express earnings. This paragraph avers that the fair and equitable basis of dividing express earnings between the charter and non-charter lines is to apportion to the charter lines such a proportion of the express earnings of defendant's entire system as the express earnings upon said charter lines bear to the express earnings upon defendant's entire system. This paragraph avers the state does not know, and is unable to ascertain, upon what terms or in what amount express matter is handled by the Illinois Central.

But whether its compensation consists of an annual rental, paid by the express companies, or a percentage upon the express matter hauled, the method set out in this paragraph is the fair method of dividing these joint earnings. Under this method, if the express business upon the charter lines, or any other lines is heavy, their share is large, and it ought to be large.

In other respects, the averments of this paragraph do not essentially differ from the former paragraphs relating to the division of freight earnings. What has been said as to the sufficiency of these former paragraphs will apply to paragraph 136.

DRAYING AND SWITCHING CHARGES.

Paragraph 137 relates to transfer and drayage charges in the city of Chicago, deducted, either in whole or in part, from the gross receipts of the charter lines. There is no direct connection by rail between the depots and freight houses of defendant and the depots and freight houses of some of the other railroads in the city of Chicago. Between these depots the freight is transferred in wagons or drays. Whenever this is done by defendant, the drayage charge is deducted from the gross freight earnings. These charges are not collected from the shipper as an extra expense. They are deducted from earnings produced by the application of the ordinary and usual rates and before the earnings are divided between the charter and the non-charter lines. A part of these expenses are therefore deducted from charter line receipts.

Paragraph 150 relates to switching charges in Chicago, where the places of business of consignees are located upon other lines, and involves the same principal as the drayage charges.

As against the right of the state to a per centum, not one dollar can be deducted from the gross receipts of the charter lines, for any purpose or on any account. Section 18 of the charter provides that the company shall keep an accurate account of the *gross or total proceeds, receipts or income* derived from the charter lines, and pay the state a per centum thereon. Broader language could not have been employed, and its meaning is too plain to be misunderstood.

"Gross or total receipts" mean everything received; not everything received, less something taken out. To deduct these expenses, or any other expenses, from the joint receipts of the charter and non-charter lines, apportion the remainder between these lines and pay a per centum upon the charter lines' share of such remainder, means to pay a per centum, *not* upon the charter lines' share of the *gross* receipts, but upon the charter lines' share of the *net* receipts. And no sort of logic, however refined, can avoid this conclusion.

Whether or not it was expedient or necessary to incur these expenses to meet competition and get business is wholly immaterial, and I shall not discuss it.

Counsel say, in their brief:

"While defendant cannot deduct any expense attending the transportation of a shipment over the charter lines, these allowances are not of that character. They are made to another company for transportation on its road or drays. The state fails to distinguish between an allowance to another company for transportation upon its rails or drays and expenses attending the movement of the traffic *over* defendant's lines. The distinction is a simple one."

The distinction is also a meaningless one. Under the charter, the state's per centum must be computed upon and measured by the total amount of the gross receipts. Until the per centum is so measured, nothing whatever can be taken *from* the gross receipts. Whether these draying and switching charges were expenses incurred in moving traffic *over* the charter lines or were allowances made to other companies amounts to nothing. The question, and the only question, is, were these expenses, or allowances, or whatever they may have been, deducted from the gross receipts derived from the charter lines? If they were

so deducted, the amount of per centum paid the state was computed and based, *not* upon gross receipts, but upon net receipts. If they were so deducted, the standard fixed by the charter itself to measure the amount of the state's revenue was changed by this defendant.

Counsel, in their brief, undertake to show that these draying and switching charges were not deducted from gross receipts derived from the charter lines. Their contention, in substance, is that the state is only entitled to a per centum of amounts actually earned upon the charter lines; that these draying and switching charges were not deducted from any earning which accrued to the charter lines for any service performed thereon, but from an earning which accrued to another company on account of a distinct and independent service; that while defendant collected only the usual charges for transportation over its own lines, as a matter of fact, a part of these charges was not collected for transportation on the charter lines, but to pay other companies for draying and switching, and was therefore no part of the gross receipts of the charter lines.

This contention, like many others strenuously urged in appellee's brief, assumes that the facts averred in the bill are not true. It assumes that upon the argument of a demurrer, you can ignore averments admitted by the demurrer. It assumes that whole paragraphs can be brushed aside and held for naught by simply asserting "they are merely conclusions."

Paragraph 137 contains this averment:

> "that said freight * * * was delivered * * * by wagons, drays and other vehicles, and for all of such freight so delivered * * * the *defendant* paid the cost of drayage thereof, *from and out of the gross or total proceeds, receipts or income of said charter lines;* that the cost of such drayage was not considered in the charges made by said defendant nor was the cost of such drayage added to the cost of transportation of such freight from said city of Chicago to its destination; that the amount *so paid out of the gross receipts of said charter lines and deducted therefrom for such drayage was, to-wit, two million dollars*, and upon said sum no per centum was paid the state."

Paragraph 150 avers that switching charges, aggregating five million dollars, incurred under precisely the same circumstances, were deducted *from and out of the gross receipts of the charter lines*, and that no per centum was paid the state upon

said five million dollars, or any part thereof. These averments are not conclusions. It is idle to so contend.

The averment, that these draying and switching charges were neither added to the ordinary rates for transportation over defendant's lines nor considered in making the rates, is the averment of a fact.

The averment, that draying charges to the amount of two million dollars and switching charges to the amount of five million dollars were paid *from and out of the gross receipts of the charter lines*, is the averment of a fact.

The averment, that no per centum was paid the state upon the amounts so deducted from the gross receipts, is the averment of a fact. And every one of these facts is admitted by the demurrers.

It is not worth while, upon this argument, to discuss a theory based upon the assumption that these averments are not true. When they answer the bill and deny these averments; when the time comes, if it ever does, that any facts are before the court which even remotely support such a theory, it will be time enough for the state to meet it.

NEWSPAPER ADVERTISING.

Paragraph 141 relates to newspaper advertising. It avers, in substance, that between 1877 and 1906, defendant, in the operation of its railroad, incurred large expenses to divers newspapers for and on account of printing and advertising, and deducted these expenses, to the amount of more than one million dollars, from the gross earnings of the charter lines; that no per centum was paid the state upon the amount so deducted from said gross earnings.

These expenses were deducted in a round-about way, but they were nevertheless deducted from the gross earnings of the charter lines, and the facts averred in this paragraph so show. Mileage books were issued to the newspapers to pay for this advertising. These mileage books were used upon the charter lines. Whenever they were so used, the charter lines performed a service on account of which an earning accrued. The amount of the earning was the value of the mileage used. But no earning were credited to the charter lines on account of the use of these mileage books. They were credited to advertising. The result was, the actual earnings of the charter lines were short by pre-

cisely the amount of the mileage used. The bill avers the total value of the mileage used was over one million dollars.

What has been said as to draying and switching charges applies also to this claim, and I shall not take time to discuss it further.

FREE USE OF CHARTER LINE PROPERTY.

Paragraphs 138, 143, 145 and 146 relate to the free use of charter line property and charter line services by the non-charter lines. These paragraphs aver that all the engines and cars owned by defendant belong to and are a part of the charter line equipment; that the depot, freight houses and terminal facilities in the city of Chicago, and all depots, switch tracks and sidings at junction points between the charter and the non-charter lines, outside of Chicago, are the absolute property of the charter lines.

Paragraph 138 avers, in substance, that since 1877 the defendant has hauled and transported over the charter lines large quantities of coal, iron and other materials and supplies for the sole use and benefit of the non-charter lines, without making any charge against the non-charter lines therefor and without crediting to the charter lines any earnings on account thereof; that it was the duty of defendant to credit to the charter lines, for and on account of such service, the usual and ordinary earnings which would have accrued to the charter lines had the service been rendered to a foreign railroad in which defendant had no interest; that if this had been done, earnings to the amount of ten million dollars would have been credited to the charter lines for and on account of such service. The latter part of this paragraph avers as follows:

"But your orator says that the defendant, for the purpose of minimizing and reducing the gross or total proceeds, receipts or income of its charter lines, and of cheating and defrauding your orator, wholly failed and neglected to credit to the amount of the gross or total proceeds, receipts or income of said charter lines any amount whatever for and on account of said services so rendered for the sole use and benefit of its non-charter lines, and wholly failed and neglected to include in any statement of the gross or total proceeds, receipts or income of said charter lines, any amount whatever for and on account of said services so rendered, and never paid to your orator any per centum on the amount which should have been so credited, or any part thereof."

Paragraph 143 avers, in substance, that the engines and cars belonging to the charter lines have, from time to time, been devoted to the sole and exclusive use of the non-charter lines, and no earnings whatever have been credited to the charter lines on account thereof; that if the usual and ordinary charges had been made for said engines and cars, earnings to the amount of three million dollars would have been credited to the charter lines.

Paragraph 145 relates specially to charter line facilities in the city of Chicago. It avers, in substance, that since 1889 defendant has permitted the Chicago, Madison and Northern Railroad, one of its non-charter lines which terminates at Chicago, to use, free of charge, all the terminal facilities of the charter lines in the city of Chicago, consisting of the passenger depot at 12th street, the suburban depots north thereof, the freight house at Randolph street, all storage, transfer and cleaning yards, the round house and shops, the team tracks and switching tracks, together with all clerical services used in or about the employment of said facilities; that the fair and reasonable compensation for the use of said terminal facilities by said non-charter line, from 1889 to 1906, was $2,140,000.

Paragraph 146 avers, in substance, that the depots, side-tracks, terminal facilities and office equipment at junctions between the charter and the non-charter lines, outside of Chicago, are the property of the charter lines; that all of this charter line property has been used by the non-charter lines free of charge; that if a fair and reasonable rental had been charged the non-charter lines for the use of this property, an earning of one million, five hundred thousand dollars would have been credited to the charter lines on account thereof.

The claims set out in these four paragraphs involve the same question, namely, the right of defendant, as against the state, to devote the charter lines to the use and benefit of the non-charter lines, without crediting to the charter lines any earnings on account thereof.

Counsel say, the charter obligation of defendant is to pay a per centum *only* upon the gross proceeds, receipts or income derived from the charter lines; that even if an earning accrued to the charter lines on account of these services, no earning was collected and nothing in fact was received by defendant for such services; that since this is true, neither proceeds, receipts nor income, within the meaning of the charter, were received by

defendant, to which a per centum could apply. If this contention is sound, all the defendant need do to wipe out the state's revenue is acquire a few more non-charter lines to whose use and for whose benefit the charter lines can be devoted.

Counsel further say the state is not the proprietor of defendant's railroad and has nothing to say concerning its use; that it stands in the same relation as the holder of an income bond secured by mortgage; that the control and management of these charter lines were committed to a board of directors, vested with full and absolute power, and this board of directors can do what it pleases.

What are the powers of this board of directors? Section 7 of the charter, after authorizing the directors to execute certain powers pertaining to the construction of the road and the transportation of persons and merchandise thereon, provides as follows:

> "with all such powers and authority for the control and management of the affairs of said company as may be necessary and proper to carry into full and complete effect the *meaning and intent of this act.*"

The intent of this act, as repeatedly announced by this court, was to aid in the construction of a railroad, and through its operation, secure to the state, for all time, an abundant and unfailing supply of revenue. No powers were granted the board of directors—and none exist—the exercise of which will defeat this intent.

If, as against the state, the board of directors can devote the engines, cars, tracks and facilities of the charter lines, free of charge, to the non-charter lines, in one case, it can do it in every case. If it can do it for one day, it can do it for one year. This means, the charter lines can be operated solely for the benefit of the non-charter lines, and without paying the state one dollar in per centum.

Our contention is, that for the purpose of an accounting, the non-charter lines are distinct and independent lines and must be so treated; that whenever a service is rendered to the non-charter lines, for which a charge would be made to any other road, an earning accrues to the charter lines; that whenever an earning accrues to the charter lines, it is the duty of defendant to credit such earning, in its account, and pay the state a per centum thereon, and a failure to do it is a fraud upon the state. Any other construction puts it within the power of defendant to defeat the very purpose and intent of this charter.

These paragraphs aver that the engines, cars, equipment and terminal facilities of the charter lines have been appropriated by and used for the benefit of the non-charter lines; that no earnings whatever were credited to the charter lines on account of such use; furthermore, they aver the fair and reasonable value of such use.

If these averments are true—and the demurrers admit they are—this defendant has failed to credit to the charter lines millions of earnings which actually accrued, and upon which the state was entitled to a per centum, and every dollar in per centum which was lost to the state increased the revenues of defendant's system. From such facts the law presumes fraud.

It avails nothing upon this argument to discuss the practice of railroads. So far as this court now knows, or can know, none exists. If a practice exists of interchanging cars, handling supplies without cost, or providing facilities free of charge, and defendant desires to rely upon it, it must answer the bill and set up the practice. It cannot demur, admit the averments contained in the bill, and then impeach the averments admitted, with a custom vouched for by its counsel. The sufficiency or insufficiency of this bill must be determined by the facts averred in it, and not by the practices *said* to exist.

Counsel say, in their brief:

"The use was more than offset by the addition to charter line business. The practice has resulted in great benefit to the state, as is shown by a comparison between exhibit '3' and exhibit '59,' from which it will appear that the semi-annual payment to the state has increased from $151,229.54, made for the six months ending April 30, 1878, to $592,322.46, made for the six months ending April 30, 1906."

The amount of the state's per centum is measured by the amount of the charter line earnings which are credited in defendant's semi-annual accounts. How a failure to credit, in these accounts, charter line earnings which actually accrued, increased the amount of the state's per centum, is not very clear.

Counsel further say:

"The non-charter lines pour their traffic into the charter lines; the terminals and junction facilities of the latter are used in common to prosper the general result."

Whether the charter and non-charter lines are treated by defendant as one system or as independent lines depends altogether on "whose ox is gored." In dividing joint earnings,

the defendant insists the non-charter lines are separate and distinct and must be treated precisely the same as though they were owned by some other company.

When it comes to the payment of operating expenses, the relations suddenly change. Then we are told they are all one system "to be used in common to prosper the general result;" that sane business methods require that the charter line depots, terminals and equipment be used, free of charge, by the non-charter lines; that since all of these lines belong to defendant, to charge the non-charter lines for a service rendered by the charter lines means to charge the defendant for using its own property, and simply amounts to a matter of bookkeeping. In other words, defendant assumes the relations between the charter and non-charter lines can be shifted and changed to suit the occasion and are purely matters of convenience to it.

The state contends that, for the purpose of an accounting, these charter and non-charter lines must be treated as distinct and independent lines, not only in the division of earnings, but in the payment of expenses; that the operating expenses of these non-charter lines can no more be saddled upon the charter lines than can the operating expenses of any other railroad.

Upon the earnings of the non-charter lines no per centum is due the state. The free use of these charter line depots, terminals and facilities, by the non-charter lines, means a saving annually to the non-charter lines of hundreds of thousands of dollars in the way of expense. This means that the annual revenue which flows into defendant's treasury from the non-charter lines is enormously increased. It needs no argument to prove that when you lessen the expenses of the non-charter lines, you increase their net earnings. Every dollar of this increased revenue is due to the fact that nothing is allowed the charter lines for services rendered the non-charter lines.

The free use of this charter line property by the non-charter lines means to increase the *net earnings* of the non-charter lines, upon which the defendant owes no per centum, at the expense of the *gross earnings* of the charter lines, upon which the defendant must pay a per centum. It means to put revenue into the treasury of the Illinois Central at the expense of the treasury of the state of Illinois.

DIVERSION OF TRAFFIC.

Paragraph 139 relates to the diversion of traffic from the charter to the non-charter lines. It avers, in substance, that defendant, for the purpose of cheating and defrauding the state and of minimizing and reducing the gross receipts of the charter lines, diverted the transportation of large quantities of freight from the charter lines to the non-charter lines and transported the same over the non-charter lines; that in every instance the freight so transported, if carried by the shortest and most convenient route from the point of shipment to its destination, would have been carried over the charter lines; that from traffic so diverted to the non-charter lines, the defendant collected and received in earnings at least the sum of two million dollars.

Under the facts averred in this paragraph, all of this traffic naturally and honestly belonged to the charter lines and was diverted by defendant to the non-charter lines for the purpose of minimizing the charter line receipts and cheating and defrauding the state of Illinois. If these averments are admitted by the demurrers, it is not worth while to discuss the theories advanced by counsel, because they assume these averments can be utterly ignored.

An averment that certain transactions constitute a fraud, or a given act is fraudulent, is a mere conclusion, which a demurrer does not admit. But the averment here is not of that character. The averment is that this traffic was diverted for the purpose of cheating and defrauding the state by minimizing and reducing the charter line receipts.

An averment that a thing is done for the purpose of defrauding, or with intent to defraud, is an allegation of fact, and not a conclusion of law. In Platt v. Meade, 9 Fed. Rep., 91, cited in our brief, the court say:

"The averments in the bill of an intent to defraud are not, as counsel for defendants claim, averments of a mere conclusion of law, to be disregarded on demurrer, except as necessarily to be inferred from the other facts alleged. They are averments of an affirmative and essential fact. An averment of actual fraudulent intent is to be passed upon as a fact, and the demurrer must be held to admit it as a fact when pleaded as the motive for the transaction."

The averment, that this traffic was diverted from the charter lines for the purpose of cheating and defrauding the state, is

admitted by these demurrers. That the revenue of the state cannot be depleted by schemes devised for the very purpose of defrauding the state, would seem to be clear.

RECEIPTS FROM EATING-HOUSES AND DINING-CARS.

Paragraph 140 relates to receipts derived by defendant from eating-houses and dining-cars operated along and upon the charter lines. It avers, in substance, that since 1877 the defendant has owned and conducted various eating-houses and hotels along and upon the charter lines and in connection therewith, for the use and accommodation of charter line patrons, and during each year received from the patrons of said eating-houses and hotels large sums of money, the exact amount of which is to the state unknown; that during said time, the defendant operated certain dining-cars upon the charter lines, for the purpose of furnishing the patrons thereof meals, food and drink, and during each year received therefor large sums of money, the exact amount of which is to the state unknown; that the total moneys received from the operation of said eating-houses, hotels and dining-cars amounted to the sum of $1,500,000; that the moneys so received were a part of the gross receipts derived from the charter lines, and it was the duty of defendant to credit said receipts to the charter lines and pay the state a per centum thereon; that defendant, for the purpose of defrauding the state, failed to credit said receipts to the charter lines and no per centum was paid thereon.

Aside from the usual complaint that the averments are general, two objections are urged to this claim. The first objection is that the operation of these eating-houses and hotels is not within the charter powers of defendant, and hence the receipts derived therefrom are not charter line receipts. Counsel say, in their brief: "The operation of hotels and eating-houses is not impliedly within a grant of power to operate a railroad." Four cases are cited in support of this contention. But the cases cited do not so hold. In the Oregon case, cited by counsel (37 Oregon, 502), the court say:

"The erection and maintenance by railway companies of hotels or eating stations at suitable and convenient places along their roads for the use and accommodation of their employees and passengers is not only *a legitimate and proper railroad use*,

but almost, if not quite, a necessity in many instances of modern railway travel. A railway company has an undoubted right to use its property in any way the exigencies of its business or the convenience or accommodation of its passengers may require or suggest."

Counsel admit that if these eating-houses and hotels were used principally for the accommodation of charter line patrons, their operation was within the charter authority. They insist, however, that the bill does not so aver; that the only averment is, they were conducted "in connection with the operation of" the charter lines, and this is not equivalent to an averment that they were used principally in connection with these lines. This is a distinction without much difference. Furthermore, it ignores facts averred. The averments of this paragraph are that these eating-houses and hotels are situated along and upon the charter lines; that they are conducted for the use and accommodation of the patrons of the charter lines and are operated in connection *with* the charter lines. From these averments, and the situation disclosed, no rational conclusion is possible other than these eating-houses and hotels are principally used by the employees and patrons of the charter lines.

The second objection is, the bill does not aver that any *gross income* was derived from these eating-houses and dining-cars. Counsel insist that no obligation is imposed by the charter to pay a per centum either upon gross proceeds or gross receipts; that the only obligation is to pay a per centum upon *gross income;* that gross income means gross increase, gross earnings, gross profits, and not any part of the capital investment; that while the bill avers large sums of money were derived from these eating-houses and dining-cars, this is not sufficient, because the moneys received may have been merely the return of capital invested in the supplies furnished the patrons; that the bill must go further and allege that gross income was derived. Counsel say, in their brief:

"While gross receipts is a broad expression, its meaning is influenced by the character of the receipts contemplated thereby and the connection in which used. The word 'proceeds' is also a broad term, but it too is one of equivalent import, with a meaning to be determined from the context. The intention of the legislature in using the words 'gross proceeds' and 'gross receipts' is manifest by their joinder with the words 'or income.' The three principal words are put upon the same plane and were

intended to convey the same meaning. There is nothing to indicate that the word 'or' was used otherwise than in its ordinary sense as a conjunctive particle, and hence the defendant can satisfy its obligation by payment to the state of the requisite per centum of gross income."

This contention means that when the legislature used the words "gross or total proceeds, receipts or income," the only thing it had in mind was gross income; that the only obligation it intended to create was to pay a per centum upon gross income. If this was its intent, the charter should be so construed. But what is there to show it did so intend? Absolutely nothing but the say-so of counsel.

The charter itself demonstrates the fallacy of any such contention. It shows beyond question that when the legislature used the words "gross or total proceeds, receipts or income," what it had in mind was not gross income, but *gross receipts*. I will ask your honors to turn to the proviso in section 18 on page 31 of the abstract. It begins about the middle of the page. This proviso is the very last expression of the legislature upon the subject of the state's per centum, and in the closing line of this proviso the words used, and the only words used, are *gross receipts*. This proviso reads as follows:

"Provided, in case the five per centum provided to be paid into the state treasury and the state taxes to be paid by the corporation do not amount to seven per cent of the gross or total proceeds, receipts or income (your honors will observe that all three of the words are here used), then the said company shall pay into the state treasury the difference, so as to make the whole amount paid equal at least to seven per cent (of what?) of the *gross receipts* of said corporation."

The significance of the use of the words *gross receipts*, in the closing part of this proviso, to the exclusion of other words, is too plain to be misunderstood. It makes it absolutely clear that what was uppermost in the mind of the legislature was not gross income, but *gross receipts*, and that the words "gross or total proceeds, receipts or income," were used in the sense of *gross receipts*.

In view of the closing words of this proviso, it is idle to discuss the meaning of "gross income," or quote decisions which involve *gross earnings*. The obligation imposed by this charter was to pay a per centum upon *gross receipts*.

Counsel say that to collect a per centum upon the daily receipts derived from these eating-houses and dining-cars simply means to collect a per centum over and over again upon the working capital invested in the food and supplies. To make the point clear, they use an illustration. On page 309 of their brief, they say:

"Suppose an expenditure of $100 of capital in the purchase of supplies, and the entire sum is collected from patrons on the sale of the prepared food. According to the state, $7 must be paid to it, leaving for reinvestment $93. Suppose the same character of purchase and collection and payment of a further seven per cent to the state. In the end, the state has all the capital."

This contention assumes that the Illinois Central buys dining-car supplies, prepares and converts the supplies into food, serves the food at its orginal cost, and does the cooking and serving for nothing. It assumes that the receipts derived from these dining-cars and hotels include no gain, but are mere reimbursements for the cost of the supplies. It assumes that when you enter "the last car in the rear," order an oyster cocktail, a beefsteak and a pot of coffee, and pay therefor a dollar and thirty-five cents, plus the salary of the waiter, that no part of this dollar and thirty-five cents is profit, but the entire amount is simply a return of the capital invested in a handful of ground coffee, half a pound of raw meat, four oysters, a tablespoonful of tomato catchup and two drops of tabasco sauce. Such an assumption is too great a tax upon human credulity.

Furthermore, whether the moneys derived from these dining-cars and hotels included profits, or were merely returns upon the capital invested, is not material upon the argument of these demurrers. Under the averments of this paragraph, these eating-houses and dining-cars were charter line concerns and the moneys derived therefrom were charter line receipts. The obligation of the charter is to pay a per centum upon gross receipts.

RENTALS RECEIVED FROM OTHER ROADS.

Paragraph 144 relates to rentals received from other railroads for the use of charter line rolling stock. It avers, in substance, that defendant collected from other railroads, for and on account of the use of charter line cars, the sum of five million dollars, and that no part of this amount was included in defendant's account of charter line receipts, and no per centum was paid thereon.

Two objections are urged to this claim. The first objection is, the bill does not aver the cars owned by defendant were *not equally* the property of the non-charter lines; that an averment that these cars are the property of the charter lines is merely a conclusion. If, as counsel say, an averment, *that these cars are the property* of the charter lines, is a conclusion, what good would it do to aver they are *not* the property of the non-charter lines? According to their theory, this would also be a conclusion. The averment, that these cars belong to and are a part of the property and equipment of the charter lines, as an averment of ownership, is amply sufficient.

The second objection is, that the rentals received by defendant for the use of charter line cars were offset by rentals paid by defendant for the use of cars belonging to other railroads. Counsel say, in their brief:

"It is common knowledge that railroads interchange cars under an arrangement by which, when the car of one company goes upon the tracks of another, the car of some other company is received. In view of the previous settlements between defendant and the state, it should be assumed that whatever sums of this character were omitted from the accounts were offset by like balances due other companies, arising from this interchange."

This court has no knowledge, common or otherwise, of the practice existing, if any does exist, as to interchanging cars. If such a practice exists, and defendant desires to rely upon it, it must answer the bill and set up the practice. This paragraph avers that that defendant collected, in rentals, five million dollars for the use of charter line cars. The argument here made simply amounts to an assertion that this averment is not true; that a practice existed of interchanging cars and no rentals whatever were in fact collected. It is simply another attempt, upon the argument of these demurrers, to impeach facts which are admitted by the demurrers.

INTEREST ON DEPOSITS.

Paragraph 149 relates to interest received upon charter line deposits. It avers, in substance, that since 1877, defendant has received, in interest, upon charter line funds deposited in banks, divers large sums of money; that no part of this interest was ever included in defendant's account of charter line receipts and no per centum was paid thereon; that defendant has refused to

furnish the state any information whatever concerning the moneys kept in banks or the amount of interest received thereon and has refused to permit the state to examine any of its books, papers or accounts relating thereto; that from the best information obtainable, the total amount of interest received by defendant upon charter line deposits was at least three million dollars.

That interest collected upon charter line receipts deposited in banks, is a part of the gross receipts derived from the charter lines, would seem too plain to admit of discussion. In view of defendant's refusal to furnish any information or permit its books and accounts to be examined, it cannot now be heard to say the averments of the bill as to this claim are too indefinite.

REBATES.

Paragraph 151 relates to rebates allowed as against charter line receipts. It avers, in substance, that defendant, for the purpose of cheating and defrauding the state, has, from time to time, allowed to certain of its patrons rebates, in the form of fictitious claims; that these rebates were deducted from the charter line receipts and no per centum was paid thereon; that while complainant is unable to state the exact amount of the rebates and fictitious claims so deducted, it avers that between October 31 1903 and October 31, 1905, there was deducted from the gross receipts of the charter lines, in claims and allowances which defendant knew to be *fictitious*, $688,179.56, and upon information and belief avers that the total amount of rebates and fictitious claims deducted from the charter line receipts since 1877 amounted to the sum of ten million dollars.

Counsel say, all rebates are not unlawful and all claims are not fictitious; that whether a given rebate is unlawful or a given claim fictitious, depends upon the facts and circumstances on which the transaction is founded; that no issuable facts are averred in this paragraph, but merely conclusions.

In the first place, it makes no difference whether these rebates, in and of themselves, were lawful or unlawful. They were deducted from the gross receipts of the charter lines, and the amount of receipts upon which the state was entitled to a per centum was thereby reduced by ten million dollars, and the demurrers so admit. The charter obligation is to pay a per centum upon the total or gross receipts. Until the per centum of the state is

measured, no rebates, whether lawful or unlawful, and no claims, whether fictitious or otherwise, can be deducted from the gross receipts.

Furthermore, the averments of this paragraph are not conclusions. The averment, that these rebates consisted of claims which defendant knew were wholly fictitious, is the averment of a fact. The averment, that these rebates were deducted from the charter line receipts for the purpose of cheating and defrauding the state, is the averment of a fact, and the courts so hold. These averments of fact cannot be converted into conclusions by a simple assertion.

The second objection urged to this claim is the chronic objection, with a little more emphasis, that items, dates, and all minutia of detail are not set out. Counsel ask: "What unlawful rebates? What fictitious claims? In whose name were they allowed? Who presented the claims?" Under their contention, more particularity in averment is required in this bill than in an indictment under the criminal code.

An indictment under the extortion statute, which averred that on a certain day the Illinois Central owned and operated a railroad in the county of Sangamon and state of Illinois, and did then and there charge and collect more than a reasonable compensation for the use of its cars upon said road, would be a good indictment. Even the date averred would not be material when it came to the proof.

The rule insisted upon by defendant's counsel would defeat a complainant in every case where his opportunities for acquiring knowledge were not equal to those of defendant. Courts are not organized to aid in the accomplishment of any such purpose.

Under the fiduciary relation which here exists, and this relation neither has been nor can be successfully denied; in view of the fact that the books and accounts are in the defendant's exclusive possession and all the transactions contained in the books are peculiarly within defendant's own knowledge; in view of the fact that an accounting is sought and the bill avers an accounting is essential to enable the state to discover the evidence, we confidently assert that the averments of this paragraph and of every other paragraph contained in the bill are sufficiently specific to meet every requirement of good pleading.

CAIRO AND MOUNDS.

Paragraph 152 relates to the movement of joint traffic from points south of the Ohio river to Cairo and Mounds. Mounds is a station or junction upon the charter lines, nine miles north of Cairo. All freight from points south of the Ohio river, destined to St. Louis, is billed to Mounds. This freight is transported over the charter lines, a distance of nine miles, and for this service the charter line is entitled to a proportionate share of the joint earning.

All freight from points south of the Ohio river, destined to Cairo, is transported over the Cairo bridge to Cairo Junction, where the bridge approach ends, and thence south upon the old charter line tracks to Cairo. This freight is transported over the charter lines, a distance of about five miles, and for this service the charter line is also entitled to a proportionate share of the joint earning.

Upon all of this freight, billed to Cairo and Mounds, the defendant charges only the local rates to the Ohio river, and all of these local rates are credited to the non-charter lines south of the river. For the five-mile haul to Cairo and the nine-mile haul to Mounds over the charter lines, the charter lines are not allowed a cent. They work for nothing and board themselves.

This paragraph avers that this practice was inaugurated and pursued for the purpose of cheating and defrauding the state; that while complainant cannot state the exact amounts earned by the charter lines in hauling the traffic to Cairo and Mounds, it avers upon information and belief that the total amount of said earnings was at least the sum of three million dollars.

Aside from the statement that this claim involves receipts derived from the carriage of interstate traffic, which I shall later discuss, and the usual complaint that the averments are general, no attempt is made to justify this practice. And in view of the practice, this is not strange.

This scheme aptly illustrates the inconsistent and dishonest methods of defendant respecting short hauls. As heretofore shown, in dividing joint earnings, whenever a short haul occurs on a non-charter line, fictitious miles are added and arbitraries are awarded. They tell us this is *common practice*, is the application of *sane business methods*, and is absolutely essential to *equalize expenses*, and permit the non-charter line to live. But when the short haul occurs on a charter line, between the Ohio

river and Cairo and Mounds—in one instance five miles and in the other nine—the *common practice* is spurned, *sane business methods* are forgotten, *operating expenses* are ignored, and the charter line is awarded nothing, because, forsooth, the haul is short.

GENERAL AVERMENTS.

Paragraphs 153 to 167 relate generally to methods of keeping the account, the character of the statements furnished the governor, the removal of certain books beyond the state, the magnitude of the accounts involved, and the various schemes practiced by defendant.

Paragraph 168 is the prayer for an accounting. Then follow the exhibits and interrogatories. In analyzing the bill, I have endeavored to discuss all the objections raised by the separate demurrers, which are relied on by defendant's counsel.

DEMURRER TO BILL AS A WHOLE.

Three objections are raised by the demurrer to the bill as a whole, and these I shall now proceed to discuss.

STATED ACCOUNTS.

The first objection is, the semi-annual statements are stated and settled accounts, and the bill, as framed, is insufficient to impeach them. It is contended that since 1877 these semi-annual statements, or copies of the *account*, furnished the various governors, have either been retained without objection or expressly approved by the governors, and the money due the state in per centum, as shown by these semi-annual statements, has been paid into the treasury; that these semi-annual statements are, therefore, in law, stated and settled accounts, and cannot be impeached except by showing fraud, accident or mistake; that this is not a bill for an original accounting, but a bill to open settled accounts.

Numerous cases are cited by counsel upon the doctrine of stated accounts and the particularity of averment necessary to open settled accounts. It will not be necessary to discuss these cases. We do not dispute the doctrine there announced, but we *do* deny its application. The question is, are these semi-annual statements stated accounts?

If they are stated accounts, I concede, here and now, this bill is insufficient and these demurrers should be sustained. If they are stated accounts, I furthermore concede this lawsuit is ended and the claims of the state are forever lost. In view of the magnitude of these accounts, the period of time covered by them, the possession of the books by this defendant and the peculiar knowledge of the facts by it, no bill can be drawn, sufficient in law, to impeach these statements under the rules applicable to settled accounts.

If these semi-annual statements are *not* stated accounts, then this is simply a bill for an accounting where payments have been made upon the open account, and as heretofore shown, under every rule of pleading, is amply sufficient.

The entire argument of defendant's counsel as to the insufficiency of the averments of this bill is based upon the assumption that these semi-annual statements are stated and settled accounts. They sum up their discussion of the division of earnings, the bridge arbitraries, the free use of charter line property, and every other claim, with the statement that these matters were included in the semi-annual statements which were passed upon and approved by the governors and were therefore, *prima facie* at least, adjusted and settled between the company and the state; that before these statements can be ignored and new methods substituted, these semi-annual statements must be impeached by the averment of facts showing fraud, accident or mistake.

If these semi-annual statements are not stated accounts, the entire fabric of counsel's argument, as to the insufficiency of the averments of this bill, falls to the ground. It is only necessary, therefore, to discuss the one question, *are these semi-annual statements or copies of the account furnished the governors stated accounts?*

The argument that these semi-annual statements are stated accounts centers around and hinges upon a single proposition, namely, *that the governor, as the agent of the state, is vested with power to determine, semi-annually, what constitutes performance of the charter obligation by the Illinois Central Railroad Company, and in the absence of a showing of fraud, accident or mistake, or that the governor was imposed upon, the judgment and determination of the governor binds the state and releases the company.* The proposition is adroitly stated in many different ways, but however stated, it has but this meaning.

Section 18 of the charter provides, in part, as follows:

"And for the purpose of ascertaining the proceeds, receipts or income aforesaid, an accurate account shall be kept by said company, a copy whereof shall be furnished to the governor of the State of Illinois; the truth of which account shall be verified by the affidavits of the treasurer and secretary of such company. And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the governor of the State of Illinois, or any other person by law appointed, to examine the books and papers of said corporation, and to examine, under oath, the officers, agents and employees of said company, and other persons."

Counsel say, the fact that "full power" was vested in the governor, by this section, to examine the company's books and its officers and agents under oath, for the purpose of verifying and ascertaining the accuracy of the account, plainly implies that judicial discretion was to be exercised by the governor and clearly manifests a purpose to provide a means of adjustment, an agency through which the semi-annual accounts could be determined and settled. They say this conclusion necessarily results, for two reasons:

First.—Because the Governor was named instead of a subordinate officer. They lay great stress upon the dignity and importance of the office of governor, and cite cases to show that ministerial duties do not, as a rule, pertain to it. They say the entire executive power of the state is vested in the governor; that he is the man who grants reprieves, issues pardons, commands armies, and convenes the general assembly in extraordinary session. This is all true, but he also signs the commissions of notaries public and justices of the peace.

Nobody questions the importance of the governor. But if counsel, instead of reading decisions from other states, will read the statutes of Illinois, they will find that where one duty is imposed upon the governor involving judgment and discretion, a hundred are imposed which are purely ministerial.

After emphasizing the dignity and standing of the governor and announcing the proposition that ministerial duties do not, as a rule, apply to him (which is not true in Illinois), counsel say, *from the mere fact the governor was named in section* 18, *it must be concluded the legislature intended he should exercise judgment and discretion in adjusting the account.* They mean, of course, judicial discretion; otherwise their contention is meaningless.

They ask, if this is not true, why was the governor named? Will the court presume the legislature intended to impose upon the governor purely ministerial duties? That he was only expected to examine the statements, compare them with the books, add up the figures, and do the work of a dummy or clerk? They wind up by saying, no such ridiculous and absurd intent will be imputed to the legislature.

The charter itself demonstrates the fallacy of this contention. By section 15, purely ministerial duties were imposed upon the governor. He was required to make a deed of the charter lands. There were no inherent reasons why the governor should make it. The lands were subject to the disposal of the legislature, and any person named could have made the deed.

The conditions upon the happening of which the deed should be made were expressly set out in section 15. The form, recitals and manner of execution were minutely prescribed. In making this deed, the governor was allowed no discretion whatever. He merely performed the work of a clerk. In view of this section, what becomes of the argument, that because the governor was named in section 18, judicial determination must have been intended?

The second reason assigned for their conclusion is, *the legislature must have intended to vest somewhere power and authority to adjust these semi-annual accounts and determine what should constitute performance of defendant's obligation.* They say the legislature must have known that important questions would frequently arise; that controversies and disputes over the division of earnings, the exclusion of expenses and many other questions, would from time to time occur; that it cannot be supposed the legislature intended to leave these questions and disputes open, and the amount due from time to time unsettled, and place defendant in the position of determining, at its peril, for each six months, the exact division and proper inclusion of earnings and receipts, thereby subjecting its accounts to never-ending review, through the changing opinions of various governors; that unless authority to adjust the accounts and determine what is performance is vested in the governor, it nowhere exists, and since this is true, it is vested in the governors. They seem to have forgotten all about the courts.

Counsel further say, the provisions and language of section 18, when rationally construed, support their conclusion; that by this section, the governor is vested with "full power" to examine

the company's books, its officers and agents and other persons, under oath, *for the purpose of verifying and ascertaining the accuracy of the account.* They lay great stress upon the words "full power." They say the grant of "full power," of authority to examine, under oath, is consistent only with recognition of discretion, judgment and finality over the subject to which the authority relates. They ask, "Why clothe the governor with 'full power' to examine the books and officers and witnesses under oath, unless it was intended he should determine the amount due? Was the governor to act simply as a reporter in taking the evidence, or was he to pass upon the evidence taken?"

They say "ascertain," according to Webster, means "to make certain to the mind; to free from obscurity, doubt or change; to make sure of, fix, to determine." That "verify" means "to prove to be true or correct; to establish the truth of; to substantiate; to correct if found erroneous." Therefore they conclude the governor was vested with "full power" to determine, fix or establish the amount due from defendant every six months, and in the absence of fraud, accident or mistake, the determination of the governor was binding upon the state.

They furthermore insist that when the charter was granted, it was a part of the general public policy to designate the governor when settlements were to be made requiring judgment and discretion. To support this contention, a number of early statutes are set out in their brief. But in every one of these statutes the power to "determine," the power to "settle," the power to bind the state, was expressly conferred. Nothing was left to inference or construction.

In section 4, chapter 41 of the Revised Statutes of 1845. cited by counsel, the language was:

"It shall be the duty of said officers, as said expenses may be incurred, to lay proper vouchers for the same before the governor, whose duty it shall be, if such accounts shall appear to be reasonable, *to allow the same and to certify the amount thereof to the auditor.*"

In section 3 of chapter 45, cited by counsel, the language was:

"The expenses * * * being first ascertained to the satisfaction of the executive, shall, *on his certificate, be allowed and paid out of the state treasury on a warrant of the auditor.*"

In section 4 of the act of 1853, cited by counsel, the language was:

"The accounts of said institutions *shall be settled with the governor* quarterly."

In the act of 1861, cited by counsel, which related to supplies furnished soldiers, the language was:

"They shall make out a detailed report, accompanied by the necessary vouchers, in writing, to the governor * * * and if the same *be approved by the governor, the auditor shall draw his warrant.*"

If these statutes prove anything in the way of a public policy, it is this, that whenever the legislature intended to confer upon the governor power to adjust or settle an account and determine what was performance, the power was conferred in express language. In other words, whenever such power was intended, the power was expressly conferred.

Defendant's counsel do not contend that by section 18, power was *expressly* conferred upon the governor to determine what constitutes performance of defendant's obligation and settle the account. They do not contend that this section, in language or terms, clothes the governor with power to approve the account, adjust the account, settle the account, or determine what was performance. What they claim is, that this power results as a matter of construction.

But the very statutes they cite refute this contention. These statutes show, beyond all question, that whenever the legislature intended that the governor, as the agent of the state, should approve an account, settle an account, or determine what was performance, the power so to do was expressly conferred in clear and unmistakable terms. From these statutes, the inference, and the only fair inference, is, that since no power was *expressly* conferred upon the governor, by the terms of this charter, to approve the account, settle the account, or determine what was performance, no such power was ever intended.

Upon the reasons which I have discussed, and they are the only reasons urged, counsel base their conclusion that the governor, as the agent of the state, is vested with "full power" to determine, semi-annually, what constitutes performance of defendant's charter obligation, agree with defendant upon the amount due for the semi-annual period and settle the account upon the basis of such agreement, and in the absence of fraud, accident, mistake, or imposition upon the governor, the judgment and determination of the governor are binding and forever conclude the state. If this conclusion is sound, and these semi-

annual statements were made in substantial compliance with the provisions of the charter, they are stated and settled accounts, and I fully agree with all the remainder of counsel's argument.

But this conclusion is not sound. It runs counter to a constitutional provision whose language is too plain to be misunderstood. It has no basis in the principles of law uniformly recognized by this court. Furthermore, it is not supported by any fair or reasonable construction of section 18.

Counsel undertake to avoid the force of the constitutional provision by playing upon words. They admit that under this constitutional provision, the governor has no power, either directly or indirectly, to release defendant from the performance of its charter obligation. They insist, however, that *releasing from an obligation* is one thing, and *determining what constitutes performance of an obligation* is entirely another thing. This fanciful distinction is based upon an expression used by the supreme court of Indiana, in Linville v. State, 130 Ind., 210. The expression was: "It is not a question of releasing the contractor, but of ascertaining whether he has performed his contract." With all due respect to the supreme court of Indiana, when it said that, it did not say much. Defendant's counsel are evidently of the same mind. After stating the questions involved in this case and quoting the opinion, they sum up their comments in three lines.

This so-called distinction between *releasing an obligation* and *determining what amounts to the performance of an obligation*, means that, while the governor cannot *release* the defendant, he can determine it *need not perform*. It means the governor would have no right to *release* the defendant from paying a per centum upon dining-car receipts (if they are charter line receipts), but he would have the right to *determine* that defendant's obligation had been fully performed without paying a per centum upon dining-car receipts, and his judgment would be final in the absence of fraud, accident or mistake. The difference between *determining* what constitutes performance of an obligation and *releasing* an obligation is the difference between tweedle-dum and tweedle-dee.

The proposition, that power is vested in the governor to determine, semi-annually, what amounts to a performance of defendant's obligation, means that authority to construe this charter is lodged in the governors instead of the courts. That the legislature so intended, will never be presumed.

If a governor was authorized to construe this charter for the purpose of determining how the joint earnings should be divided, what should be included in gross receipts, whether bridge arbitraries should be deducted and charter line property used free, this charter would have as many meanings as there were governors. Under one governor, the mileage basis would be the rule, and under another it would not. During one administration, the Cairo bridge would be railroad track, and during another, an ingenious device to absorb earnings.

It would mean, the construction of this charter would ultimately depend upon the exigencies of politics instead of principles of law applied by the courts. It would mean, the revenue of the state, derived through this charter, must be measured by and depend upon the action and determination of a single individual, from whose judgment there was practically no appeal.

Counsel say, the governor is vested with "full power" to determine what amounts to a performance of defendant's obligation, and in the absence of a showing of fraud, accident or mistake, his determination is final. If this is so, what redress has the state? Suppose a governor determined that bridge arbitraries should be deducted from charter line receipts, and his judgment was wrong as a matter of law, how could you impeach it? To aver and prove a mistake of law would avail nothing. How could you show either accident or fraud? Neither would be presumed because the governor mistook the law. In practical effect, his determination would be as absolute as the edict of a Czar. The framers of this charter never intended to lodge such power in a single individual, regardless of whom the individual might be.

If the governor is authorized, semi-annually, as the agent of the state, to adjust the account and determine what constitutes performance of defendant's charter obligation, from whence does this authority arise? Under the constitution of 1848, the powers of the governor were limited to the powers therein enumerated and such implied powers as were necessary to the exercise of the enumerated powers. It will not be contended the authority here claimed arises from the general nature of the office nor from the constitution and statutes in force at the time the charter was passed.

If the authority exists, it was conferred by this charter. Your honors will search this charter in vain for an express provision authorizing the governor to approve the account,

adjust the account, settle the account, or determine the measure of defendant's obligation. It is not there, and counsel admit it. Their argument is, it must have been intended, and therefore exists, as a matter of construction. The settled doctrine of this court is that "construction for the purpose of conferring power should be resorted to with great caution and only *for the most persuasive reasons.*" (Field v. People, 2 Scam., 105.) The only reasons suggested, persuasive or otherwise, are those I have discussed. The cases cited in appellee's brief involved powers *expressly conferred*, and for that reason are not in point. The question here is, *was the power conferred?*

An examination of this charter conclusively shows that its framers were keen, intelligent, far-sighted men. They were building for the future. The numerous and minute provisions safeguarding the revenue of the state, the rights of the stockholders and the interests of the corporation warrant the conclusion they overlooked very little.

If they had intended to clothe the governor with power to reject or approve the semi-annual statements, determine what should be performance and settle the account, the charter would have so expressly provided. A matter so important would not have been overlooked. From the fact the charter does not so provide, the presumption is they did not so intend. Furthermore, this power is not essential to the exercise of any power expressly conferred.

The framers of this charter saw no reason for vesting in the governor the power here claimed, and there was none. The argument, that this power is essential in order to protect the defendant's stockholders, enable the company to know when its obligation ends, and some time or other settle the account, sounds well but means little. Under this charter, the obligation of the Illinois Central will never end, and never ought to end, until it pays what it owes. Whenever it does, no action will be required on the part of a governor to save it harmless from further payment.

The meaning of this charter, and what amounts to performance under it, must be determined by the courts and not by the governors. If doubts arise as to the meaning of gross income, the allowance of expenses, the deduction of arbitraries, the division of earnings, or any other matter, these doubts must be resolved by the courts, under the recognized principles of law.

If defendant has acted upon its own interpretation or that of governors, it has taken its own chances. This charter means today precisely what it meant in 1877. The construction placed upon it by this court *now* was what it meant then. The obligation resulting from the meaning of this charter, as now adjudged by this court, was the obligation which existed in 1877, and every year since. If defendant has paid less than the charter, *as now construed by this court*, required, its obligation is unperformed—it yet owes the state—and neither a governor nor any other officer can either *release* the defendant, or do what amounts to the same thing—*determine* it does not owe.

Furthermore, if, prior to the constitution of 1870, any reasons existed to support the theory advanced by counsel, no reasons *whatever* have existed since, and the accounting sought begins with 1877. The right of the people, in constitutional convention, to take away power conferred by the legislature, upon a governor or any other officer, will not be denied by any lawyer.

The constitutional convention of 1870 submitted to the people—and the people adopted—a separate section, which reads, in part, as follows:

"No contract, obligation or liability whatever of the Illinois Central Railroad Company to pay any money into the state treasury * * * in accordance with the provisions of the charter of said company, approved February 10, in the year of our Lord 1851, shall ever be released, suspended, modified, altered, remitted or in any manner diminished or impaired by legislative or other authority."

In the Goodwin case, 94 Ill., 265, this court, per Justice Walker, in referring to this provision, said:

"By a separate section of the constitution of 1870 it is provided that no contract, obligation or liability of this company to pay any money into the state treasury, nor any lien of the state upon or right to tax property of the company in accordance with the provisions of the charter of the company, shall ever be released, suspended, modified, altered, remitted, or in any manner diminished or impaired. * * * This section is of binding force and unalterable by legislative action, and the courts cannot do otherwise than enforce it. To do otherwise would be to violate the obligation of the contract and to disregard this requirement of the constitution."

The words, "in accordance with the provisions of the charter," as used in this constitutional provision, do not mean in accord-

ance with the interpretation of a governor, a legislative committee, or an accounting officer of the Illinois Central. It is idle to so contend. They mean, *in accordance with its true and lawful meaning.* And the true and lawful meaning of this charter, or any other charter, is the meaning placed upon it by the courts.

Under this constitutional provision, the revenue of the state, measured by the *true intent and meaning* of this charter, is forever guaranteed. So measured, it can never be released, remitted, diminished nor impaired, either directly or indirectly, by any authority whatsoever.

In the face of this provision, to say that the governor can construe this charter, determine the measure of defendant's obligation, settle the account, and in the absence of fraud, accident or mistake of fact, his judgment, whether right or wrong, as a matter of law, binds the state and absolves the defendant, is, to put it mildly, an astounding proposition.

There was no intention of making the governor a court or clothing him with power to determine what should be performance of defendant's obligation. Furthermore, even if the legislature did so intend, no court in the land would carry out the intent.

The constitution provides:

"The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial: and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others."

The constitution of 1848 contained the same provision. The power to construe and interpret contracts and determine what amounts to performance of them belongs to the judiciary. Any attempt to transfer this power from the courts to the governors is absolutely void.

The framers of this charter were men well versed in the law. They expected and believed, if doubts arose as to its meaning or what amounted to performance of it, resort at once would be had to the courts; in other words, that the true intent and meaning of this charter and what amounted to performance of it, would be determined in a legal way.

The construction placed upon section 18 by defendant's counsel is unwarranted and strained. The purpose of this section was to provide the means of compelling defendant, every six months, to pay all that it owes; not all that it owes according

to the notions of the particular individual who, for the time being, happens to be governor; not all that it owes according to the holding of defendant's law department; not all that it owes according to the views of a legislative committee, but all that it owes according to the *legal* intent and meaning of this charter.

If doubts arise or controversies exist as to its legal intent and meaning or what is embraced within its provisions, these questions must be submitted to the courts. It is no answer to say, "this means a lawsuit every six months." Such a contention is simply absurd. But if it were true, it would be no answer. In no other way can the legal intent and meaning of this charter, or any other charter, be ascertained or declared.

If the governors have assumed to construe this charter and their construction was wrong as a matter of law, whether it was due to fraud, accident, mistake, imposition upon the governor, or ignorance of the law, can make no difference. Upon what theory can the state be bound by a wrong construction put upon this charter by an officer who had no right to construe it?

If the Illinois Central, instead of having this charter construed by the courts and its legal meaning declared, has acted upon its own judgment or that of the governors, and because it did, has paid less than was due according to its true and legal effect, it yet owes the state, and no amount of argument can avoid this conclusion.

It is idle to talk about practical construction or loudly proclaim "the state has stood by for fifty years and done nothing." Practical construction can neither modify a line of this charter nor release a dollar due under it. The state could act only through its officers. The state is not estopped and no laches is imputable to it because its officers failed to act. This court has repeatedly declared that the failure or refusal of its officers to act, whether for one year or fifty years, can neither prejudice nor impair the rights of the state.

It is no answer to say, "there ought to be a time when controversies end." The people of this state, in their sovereign capacity, have declared that this controversy shall never end and this charter obligation shall never be satisfied until the Illinois Central pays into the treasury every dollar that it ever owed.

The purpose of section 18 was to provide the means of compelling defendant to pay a per centum upon all of its gross receipts. If any question arose or doubt existed as to the meaning of gross receipts, what should be included, or as to any other

question, it was the duty of the governor and the business of defendant to submit the matter to the courts for legal determination. If the governor failed, he neglected his duty. If defendant failed, it took its own chances. It was not the purpose of this section, nor of any other section, to furnish an opportunity to escape full payment under the guise of a stated account.

Will your honors kindly turn to section 18? It begins on page 27 of the abstract. I have read parts of this section several times, but in this connection I desire to read it all. It provides as follows:

"Section 18. In consideration of the grants, privileges and franchises herein conferred upon said company for the purposes aforesaid, the said company shall, on the first Mondays of December and June in each year, pay into the treasury of the State of Illinois five per centum on the gross or total proceeds, receipts or income derived from said road and branches for the six months then next preceding. The first payment of such per centage on the main trunk of said road to commence four years from the date of said deed of trust, and on the branches, six years from the date aforesaid, unless said road and branches are sooner completed, then from the date of completion. And for the purpose of ascertaining the proceeds, receipts or income aforesaid, an accurate account shall be kept by said company, a copy whereof shall be furnished to the governor of the State of Illinois; the truth of which account shall be verified by the affidavits of the treasurer and secretary of such company. And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the governor of the State of Illinois, or any other person by law appointed, to examine the books and papers of said corporation, and to examine, under oath, the officers, agents and employees of said company, and other persons. And if any person, so examined by the governor or other authority, shall knowingly and wilfully swear falsely, or if the officers making such affidavits shall knowingly and wilfully swear falsely every such person shall be subject to the pains and penalties of perjury."

By this section, two obligations are imposed upon defendant. The first obligation is to pay into the treasury, on the first Mondays of December and June, five per cent of the gross receipts. This obligation is subject to no conditions. The days of payment are named, the rate of per centum is fixed, and the funds to which the per centum applies are expressly pointed out.

Whether a copy of the account is filed with the governor, or whether it is not, the payment must be made. There is no power in the governor, either through action or non-action, to change or postpone this obligation. The obligation is absolute.

The court will observe that under this section, the semi-annual payment is not made to the governor, nor through his office, but directly into the state treasury. The governor has nothing to do with the payment. He is not consulted before it is made. Neither the time of making the payment, the amount of the payment, nor the manner in which it is made, depends upon the approval or any other action on the part of the governor.

At or about the time the payment is made, a statement or copy of the account is furnished to the governor, which shows, or ought to show, the amount and character of the gross receipts upon which the payment was computed. There is no requirement that the copy of the account shall be furnished the governor before the payment is made. It may as well be after. It frequently occurs that a copy of the account is sent to the governor and a draft for the payment is sent to the treasurer by the same mail. And yet they tell us a statement of this character, upon which no action was or could have been taken, affecting either the manner or the amount of the payment made, is a stated account.

Recognizing the weakness of this contention, counsel attempt to bolster it up with a presumption. They say the statements were referred to the auditor or filed in his office by the governor; that the statute provides no money shall be received by the treasurer except upon an order from the auditor, and therefore it must be presumed the statements were filed with the auditor by the governor for the purpose of collecting the balance shown to be due.

About all that is necessary to refute this contention is to state it. There is no requirement that the semi-annual statements shall be filed with the auditor or referred to the auditor. All that was necessary to obtain an order from the auditor to pay the money into the treasury was a request from the treasurer. The only purpose of requiring an order is to check up the books of the auditor and treasurer. Furthermore, the presumption is, the semi-annual payments were made when due. The endorsements show that these semi-annual statements were neither filed with the auditor nor referred to the auditor until long after

the payments were made. No action of the auditor nor of any other officer was ever predicated upon these statements.

The second obligation imposed upon defendant by section 18 was to keep an *accurate account* of the gross proceeds, receipts or income and furnish the governor a copy of the account, verified by the oaths of its treasurer and secretary. While the words used are "the truth of *which account* shall be verified by the affidavits of the treasurer and secretary of such company," it is evident the legislature intended the *copy* should be verified rather than the account itself. I do not understand that defendant's counsel contend otherwise.

The character of the copy required by this section must be determined by the purpose which the legislature intended the copy to subserve. By "a copy of the account," I do not believe the legislature meant a transcript of all the books, records, schedules, data and entries which enter into and make up the account. Such a document would be wholly impracticable. If the governor examined it, he would have to employ experts, and he might as well examine the books themselves. Neither do I believe that by "a copy of the account," the legislature simply meant the final ledger balances classified under the different months. Such a document would be absolutely useless.

The purpose of furnishing the governor a copy of the account was to afford him a knowledge of the company's affairs, an insight into its business methods and a basis for speedy and intelligent investigation. The copy furnished should contain sufficient information to fairly and reasonably answer this purpose.

The copy of the account should not only show classified totals and ledger balances, but how the earnings which produced these totals were made up, the methods employed in dividing joint receipts, distributing joint expenses, deducting bridge arbitraries, using charter line terminals, and in a general way, all the methods employed which directly affected the basis of the account.

The copies of the account furnished by defendant in no sense whatever meet this requirement. Will your honors turn to exhibit "53," on abstract page 317? This exhibit was selected at random. I could just as well have taken any one of the others. This is the semi-annual statement or copy of the account for the six months ending April 30, 1903. The statement ends April 30, instead of May 31, the close of the semi-annual

period, for the reason that a month was required to prepare the statement.

This semi-annual payment was due June 1, 1903 and is presumed to have been made at that time. According to the file marks which appear in the last line on the page, this statement was not filed in the auditor's office until September 16, 1903, or over three months after the payment was made. The affidavit was not made either by the treasurer or secretary, and in no respect complies with the charter, but I shall not take time to discuss this affidavit.

The statement itself discloses nothing but monthly totals, derived from fifteen different sources. Joint earnings are not mentioned. Methods of division are not disclosed. Bridge arbitraries and charter line terminals are absolutely ignored. Not even a clue is afforded to the methods or bases upon which these monthly totals were figured. And yet counsel say, the governor, by retaining this semi-annual statement, approved all the methods practiced by defendant, and the semi-annual statement thereby became a stated account.

Will your honors again turn to abstract page 28? Section 18, after providing that a copy of the account shall be furnished the governor, provides as follows:

"And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the governor of the State of Illinois, or any other person by law appointed, to examine the books and papers of said corporation, and to examine, under oath, the officers, agents and employees of said company, and other persons."

The sentence just preceding relates to the copy. While in the last clause the word "account" is used, as heretofore shown, and as all of us agree, the legislature intended the *copy* should be verified, rather than the account itself. It is equally clear that when the legislature, in this sentence, used the words, "and for the purpose of verifying and ascertaining the accuracy of such account," what it meant was the *accuracy of the copy.* If the legislature intended to confer upon the governor, regardless of the copy, full power to examine the account itself, why resort to this circumlocution? If it so intended, it would simply have said: "Full power is hereby vested in the governor, or any other person appointed by law, to examine the account and the books and papers of said corporation, together with the officers, agents and other persons, under oath."

"Verify," according to its usual and ordinary meaning and according to the *first* definition by Webster, means "to prove to be true; to establish the truth of; to confirm as by comparison with facts; to substantiate, as by reasoning; as to verify an account or a statement; to verify a theory."

For some reason counsel treat the word "ascertain," the second word used, as more important than the word "verify," the first word used.

The use of the word "verify" and the connection in which the word is used, clearly shows that what the legislature had in mind was the copy of the account, and not the account itself. To say, this construction means that the governor shall act simply as a clerk in adding up the figures or merely as a reporter in taking down the evidence, is simply nonsense.

As heretofore shown, the legislature intended that the copy of the account furnished the governor should not only disclose the monthly receipts, but the methods employed to produce the receipts. It furthermore intended, if the information contained in the copy furnished was not sufficient to satisfy the governor that the receipts reported were all of the receipts, or the methods disclosed were honest and fair, he should examine the books and papers themselves, and the officers and agents, under oath, for the purpose of finding out. These copies of the account bear no relation to any known theory of stated accounts.

No action is contemplated upon these statements before the semi-annual payments are made. The exhibits show that some of the statements were endorsed by the governor "examined and approved." No provision can be found authorizing such approval. The approval was meaningless.

Counsel say a *balance* was shown to be due by each semi-annual statement, and since the governor received and retained the statement without objection, the law presumes he accepted the balance in full settlement. Nothing like a balance, in any sense, was either shown or required to be shown upon these semi-annual statements. All that appears is a mere computation of seven per cent on the earnings included, and this was not required. To say, because the governor retained a statement which the law required should be furnished to him, he thereby approved the statement, is not the law and never was.

Furthermore, no action was ever taken upon these statements. Counsel say, the law presumes the governors did their duty and

made whatever investigation was necessary to an intelligent determination.

The bill avers and the demurrers admit that not one of these semi-annual statements was verified either by an investigation of the books or an examination of witnesses. The statements themselves show that no examination was possible. All that was done was to glance at the statements, pick up a pen and mark them "approved," and pass them on to the auditor in order to get rid of them.

Will your honors turn to exhibit "5", abstract page 269? This statement was sworn to in Chicago by John C. Welling, before Jesse W. Ott, a Notary Public, on June 26, 1879. Mark the date, *June* 26. Whether it was sent from Chicago by messenger or by mail, in the usual and ordinary course of business, the governor did not receive it until the next day, or June 27. The statement shows it was "examined and approved" on June 27, the very day it was received.

And yet we are told, the court must presume that Governor Cullom, between the morning of June 27 and sometime in the afternoon, took up this abstract of monthly receipts which showed nothing but classified totals, deciphered the basis of dividing joint earnings, the methods employed between the different lines, compared it with the books, and intelligently determined that $149,635.42 was all the company owed.

They say we are smirching Governor Cullom. If it was true, this would be no answer. But it is not true. Defendant's counsel will get up no issue with me over the honesty of Shelby M. Cullom. I have followed his banner for thirty years and expect to follow it as long as it waves. For half a century he has represented the people and moved in the public gaze. In his record there is no dishonor. Around his name there lurks no scandal. Upon his memory will rest no stain. When his days go out, the people of Illinois will write as his epitaph: "He was an honest man, a patriotic citizen, a faithful servant, a wise counsellor, a practical statesman. He never knowingly forsook the people, betrayed a trust, nor deserted a cause."

But neither Shelby M. Cullom nor any other governor was perfect. From the days of Bond to the days of Deneen, they have made mistakes. But because they have, they were not dishonest.

By section 18, the governor is authorized to examine the books, but this duty is not mandatory. A failure to perform it

is neither misfeasance nor malfeasance. The bill simply avers this duty was not performed.

It avails nothing upon this argument to travel out of the record and insinuate that investigations were made. Let them answer the bill and set up these assertions. Whenever they do, the state will show the governors were imposed upon; that the investigations made were nothing but farces; that the accountants employed to represent the state were "wined and dined" by the Illinois Central, and the reports written were dictated by the company's own officials.

The contention, that these copies of the account or so-called semi-annual statements are stated accounts, ignores principles of law which are absolutely settled in this state. *A stated account is a new contract, and any suit brought thereon must be upon the new contract.*

In Dick v. Zimmerman, 207 Ill., 639, this court, per Justice Scott, said:

"In an action upon an account stated, the original form or evidence of the debt is unimportant, for the stating of the account changes the character of the cause of action, and is in the nature of a new undertaking. The action is founded, not upon the original contract, but upon the promise to pay the balance ascertained."

In Sutphen v. Cushman. 35 Ill., 199, this court, per Justice Beckwith, said:

"The settling and stating of an account between the parties changed the character of the indebtedness."

The only way you can change the character of an indebtedness is by making a new contract.

Many other decisions of this court are cited in our brief. The attempt of counsel to wipe out these decisions by simply saying, "the court was talking about the remedy," is idle. The doctrine announced in these cases is that *the stating of an account is a new undertaking, a new agreement. a new contract, and any suit brought on the stated account is on the new contract instead of the old*—and this doctrine is sound. Furthermore, it is sanctioned by many other courts.

In State v. Brown, 10 Oregon, 215, the State of Oregon sought to recover a large sum of money which it claimed had been paid by mistake to Brown during his official term as state printer. It was contended by Brown that his claims had been allowed and warrants drawn therefor by the secretary of state,

who was *ex-officio* state auditor, and were therefore stated and settled accounts. The warrants had been paid.

The statute of Oregon provided the secretary of state should superintend the fiscal concerns of the state; examine and determine the claims of all persons against the state; endorse upon the claims the amounts due and allowed and draw warrants therefor upon the treasury. It expressly authorized the secretary to swear the claimants and any other persons and examine them either orally or in writing as to any facts relating to the justice of the claims. Under the statute of Oregon, the secretary of state had much greater powers than are vested in the governor by this charter. In passing upon the question of stated accounts, the court said:

"Another point contended for by the appellant is that if the auditing and allowance of a claim by the secretary should be deemed to be of no effect as a judicial determination, still it would operate to convert the same into an account stated, and bar any recovery in an action at law where a mistake only is alleged; but a stated account in this sense derives all of its force from the agreement of the parties, express or implied. It is in effect a *new contract* in writing, and is equally conclusive in an action at law, but it presupposes parties capable of making a written contract which will bind them in the absence of fraud or mistake, although one or both may have relinquished valid demands to secure the settlement, which, if they had been allowed would have sensibly affected the balance.

"In the case here there was no opportunity for any agreement. The secretary did not and could not have entered into any contract with the claimant. He was authorized to allow just what was due the claimant according to his judgment and was not justified in allowing anything beyond. If the state had contracted to pay so much, the secretary's power to audit the claim and ascertain what should be due thereon did not authorize him to enter into a *new contract with the claimant through the form of a stated account by which the latter might assert a claim to a greater amount than should be found due him under his original contract with the state. We think the secretary has no power to state an account with the claimant which will bind the state.*"

This decision is nothing more nor less than the intelligent application of principles uniformly recognized by this court, from the 4th Gilman to the present time. They absolutely dispose of defendant's contention that these semi-annual state-

ments are stated accounts. To so hold, means the governor of Illinois can change the obligation imposed by this charter and make a new contract with the Illinois Central. In my humble opinion, no court in the land will ever so hold as long as the constitution stands, wherein it is written:

"No contract, obligation or liability whatever of the Illinois Central Railroad Company to pay any money into the state treasury * * * in accordance with the provisions of the charter of said company, * * * shall ever be released, suspended, modified, altered, remitted, or in any manner diminished or impaired by legislative or other authority."

THE STATE TAX QUESTION.

The second point raised by the demurrer to the bill as a whole is that no state tax was assessed upon the stock, property and assets of defendant for any of the years prior to 1905, and hence nothing can be recovered in addition to *five* per cent of the gross receipts.

Section 18 of the charter provides that defendant shall pay into the state treasury, on the first Mondays of December and June, *five* per centum on the gross receipts derived from the road and branches for the six months then next preceding.

Section 22 provides that after six years, the stock, property and assets of defendant shall be listed with the auditor, and an annual tax for state purposes shall be assessed thereon by the auditor; that whenever the taxes levied for state purposes exceed three-fourths of one per centum, such excess shall be deducted from the gross receipts; that the revenue arising from said taxation and the said five per cent of the gross receipts shall be paid into the state treasury in money and applied to the payment of the state indebtedness; that in case the *five* per cent and the state taxes in any year do not amount to *seven* per cent of the gross receipts of the charter lines, then defendant shall pay into the treasury the difference, so as to make the whole amount paid equal *at least* to seven per cent of such gross receipts. In other words, in case the state tax, in any year, does not amount to two per cent of the gross receipts, enough must be added to the state tax to make it amount to two per cent, so that the whole amount paid shall be equal *at least* to seven per cent of the gross receipts.

The bill avers that during each and every year, from 1859 to 1905, the defendant failed to list its property with the auditor for taxation, and the auditor failed to assess a state tax thereon;

that the reason for this failure was that both the defendant and he auditor knew that a state tax levied upon the stock, property and assets of defendant would not amount to two per cent of the gross receipts of the charter lines. In other words, that *five* per cent of the gross receipts and the state tax would not amount to seven per cent of the gross receipts of the charter lines, the minimum amount which defendant must pay. They evidently believed that since the tax, if levied, could make no possible difference in the amount of the payment required, to levy the tax would be an idle ceremony.

In their view, the state was not so much concerned about the observance of the formalities prescribed by the charter as it was in securing the full amount of money due under the charter, and so long as defendant was not required to pay more than seven per cent of its gross receipts, it was a matter of indifference to it whether the form of levying a tax was gone through with or not.

For this reason the defendant, instead of listing its property with the auditor and paying into the treasury *five* per cent of its gross receipts, a state tax and the difference between the sum of these two, and seven per cent of its gross receipts, paid into the treasury, semi-annually, in a lump sum, seven per cent upon what it claimed and reported to be the gross receipts of the charter lines.

The semi-annual statements have already been discussed. In each one of these semi-annual statements, the defendant claimed and pretended to include the gross or total receipts derived from the charter lines for the semi-annual period. In every instance, upon the total receipts included in these semi-annual statements, the defendant computed *seven* per cent and paid the amount so computed into the state treasury.

A computation was made upon the statements themselves by defendant's own officers. Will your honors turn to exhibit "3," on abstract page 267? This is the first semi-annual statement which is made an exhibit. This statement purports to show all of the charter line receipts for the six months ending April 30, 1878. The total amount of these receipts was $2,160,421.99. Below the recapitulation and above the affidavit you find the following: "Seven per cent upon which is $151,-229.54." The amount thus computed was paid into the treasury. Take exhibit "4" on the next page, and you find the same thing. Take any one of these semi-annual statements, from 1877 to 1906, and you find the same thing. During this entire period, the defendant paid into the state treasury seven per cent on what

it claimed and reported to be the gross receipts of the charter lines as and for a compliance with sections 18 and 22.

In 1905 the state discovered that these semi-annual statements were false and fraudulent, and that millions of dollars of charter line receipts had been omitted from these semi-annual statements, upon which the state had received no per centum. This bill was filed to compel the defendant to account for and pay into the treasury seven per cent on the gross receipts of the charter lines, which were wholly omitted from these semi-annual statements.

The defendant now insists that because it failed to list its property with the auditor and because the auditor failed to assess a state tax, this bill will not lie. Its contentions, in substance, are:

1. That there is no obligation imposed by the charter to pay seven per cent of the gross receipts, but the obligation is to pay five per cent of the gross receipts, a state tax, and the difference between the sum of these two and seven per cent of the gross receipts.

2. That the state tax required to be paid by section 22 is a tax in the strict sense, and is referable to the taxing power.

3. That this payment, being a tax, valuation and assessment are essential to its collection; that since defendant's property was not listed with the auditor and no state tax was assessed thereon, a bill will not lie to collect either the tax itself or any equivalent or substitute therefor, and furthermore, the right to collect the tax is expressly waived in the bill.

4. That there can be no accounting for five per cent of the gross receipts, because the bill does not allege that the amounts actually paid by defendant were less than five per cent of the gross receipts, including those omitted from the semi-annual statements, and no accounting is demanded for five per cent.

5. That when defendant paid seven per cent upon the gross receipts included in its semi-annual statements, it paid two per cent more upon said receipts than the charter required, and the court must presume this additional two per cent was paid by defendant and accepted by the state, in full satisfaction of all the per centum then due the state upon charter line receipts which were not reported.

These contentions ignore both the letter and spirit of the most important provision of section 22. This provision reads as follows:

"Provided, in case the five per cent provided to be paid into the state treasury and the state taxes to be paid by the corporation do not amount to seven per cent of the gross or total proceeds, receipts or income, then the said company shall pay into the state treasury the difference, so as to make the whole amount paid equal at least to seven per cent of the gross receipts of said corporation."

In the language of Judge Dickinson, "as well might Antonio have attempted to rail the seal off the bond," as for counsel to attempt to expunge from section 22 this significent and controlling provision.

Because this part of section 22 is a proviso, does not weaken it. While the usual office of a proviso is to limit, and not enlarge, when the language is clear and the intent manifest, it is treated and construed as affirmative legislation. This doctrine is settled in Illinois. In the case of In Re Day, 181 Ill., 80, in construing a proviso, this court, per Justice Cartwright, said:

"There is authority, however, for holding that the intention of the legislature, if plainly expressed, is to have the force of law, although in the form of a proviso, and we will treat this proviso as an *enactment in itself*."

This proviso is the only provision of the entire charter which definitely fixes the minimum amount which defendant must pay. Furthermore, it is the very last expression of the legislature upon the subject of the state's revenue, and, under the settled rules of construction, must therefore control.

The language of this proviso is plain. The words, "so as to make the whole amount paid equal *at least* to seven per cent of the gross receipts," can neither be distorted nor misunderstood. The intent here manifest, that defendant shall pay *at least* seven per cent of the gross receipts, overshadows and outweighs every other provision which has any bearing upon the payments required. The making of this payment which, under any and all circumstances, must equal *at least* seven per cent of the gross receipts, is the real and ultimate thing required.

Counsel say, this proviso does not relieve defendant from its obligation to pay five per cent and the state tax; that these obligations still continue. This means, if it means anything, that when you satisfy the *whole* of an obligation, you do not satisfy all of its parts.

Under the constitution, the obligation imposed by this proviso to pay into the state treasury *at least* seven per cent of the

gross receipts, can never be released, suspended, modified, remitted, nor in any manner diminished or impaired by legislative or other authority. And yet we are told, because the defendant failed to list its property and because the auditor failed to assess a tax, two-sevenths of this entire obligation has been absolutely and forever released; that no bill can be drawn, which states the facts, under which a recovery can now be had for a single dollar more than the five per cent. In other words, in spite of the constitution, by failing to perform a duty enjoined, the Illinois Central and the auditor of state can change the measure of this obligation from seven per cent to five per cent.

Counsel's entire argument is based upon a misapprehension of the legislative purpose in the enactment of sections 18 and 22. Their notion is, the sole object of the legislature in adopting these sections was to require three separate and distinct kinds of payment, viz., five per cent of the gross receipts, a state tax and a difference. A more aimless intent was never imputed to a legislature.

What possible difference could it make to the state whether or not the revenue paid was a per centum as such, a tax as such, and a difference as such? Under the charter, all of this revenue goes into the treasury, is there commingled and appropriated to one object. Why enact provisions merely to create *three separate and distinct kinds of payment?*

Counsel say, in their brief:

"The state does not perceive that an agreement to pay five per cent, the state tax, and the difference, if any, between their sum and a third sum, is not an agreement to pay such third sum, independent of the items composing it."

We admit the accusation. We confess that our perception is not keen enough and our imagination is not vivid enough to recognize any substantial difference between paying into the treasury, in a lump sum, one hundred dollars, and paying into the treasury fifty dollars and twenty dollars and the difference between the sum of these amounts and one hundred dollars.

In adopting these sections, what the legislature had in mind was the *amount* of revenue to be secured to the state and not the particular *kinds* of payment.

The framers of this charter believed that the Illinois Central, in consideration of the grant of lands and the privileges conferred, should pay into the treasury *at least* seven per cent of its gross receipts. But they furthermore believed the time would

come when it ought to pay more. So believing, their object was to devise a plan under which the company could never pay *less* than seven per cent, but might be required to pay *more*.

This object could not be attained by a definite per centum upon the gross receipts alone. The framers knew the charter would be a contract; that if a definite per centum *alone* was provided, the Illinois Central could never be required to pay anything more than the per centum fixed. For *these reasons*, and not for the purpose of providing *three separate and distinct kinds* of payment, they adopted sections 18 and 22.

Section 18 provides that the company shall pay into the state treasury, semi-annually, five per cent of its gross receipts.

Section 22 provides: *first*, that the company shall list with the auditor, annually, its stock, property and assets; that the auditor shall assess a state tax thereon, and the revenue arising from the per centum and the tax shall be paid into the treasury and applied to the payment of the state indebtedness; *second*, that in case the five per centum and the tax do not amount to seven per cent of the gross receipts, *then the company shall pay into the treasury the difference, so as to make the whole amount paid equal at least to seven per cent of the gross receipts.*

Through the scheme enacted by these provisions, the intent of the framers of this charter was intelligently carried out. Under this scheme, the Illinois Central can never pay *less* than seven per cent, but when the time comes, if it ever does, that five per cent of its gross receipts and a state tax exceed seven per cent of its gross receipts, it must pay *more*. You can theorize until the end of time, and no other fair or intelligent meaning can be given these sections.

The provisions for listing defendant's property and levying a state tax, are provisions wholly for the benefit of the state, and the state alone can complain of their non-observance.

The intention of the framers of the charter was, that defendant should pay into the state treasury the full amount which any other corporation would be required to pay as *state taxes*, if its property were listed and the taxes were levied in the manner prescribed in defendant's charter. It was also their intention that out of the total seven per cent of its gross receipts—which must be paid in any event—the defendant might use the necessary amount, not exceeding, however, two per cent, in the payment of such taxes.

There was no way for the state to secure to itself the benefit of the payment by defendant of any excess of its taxes, over two per cent of the gross receipts, except by providing for the assessment of defendant's property and the levying of the tax. If the tax does not amount to two per cent of the gross receipts, the state gains nothing by the levy. Had it been certain that a state tax upon defendant's property would never exceed two per cent of the gross receipts, no provision at all would have been made for the levy of the tax. But this was not certain. On the contrary, the legislature believed the time would come when the tax would *exceed* two per cent, and they furthermore believed when such time came, the defendant should pay, for the privileges enjoyed, more than seven per cent upon its gross receipts. For this reason, and for this reason alone, it provided for the listing of defendant's property and the levying of a state tax. This provision was made for the sole benefit of the state.

In no event and under no circumstances could any advantage or benefit be derived by defendant, under the charter, from the levy of this tax. The only instance in which the levy of the tax could make any possible difference to defendant would be where the tax exceeded two per cent of the gross receipts, and this difference would be against the defendant instead of in its favor.

This provision for the listing of defendant's property and the levying of a state tax, being for the sole benefit and advantage of the state, the same rule applies as in any other like case. The rule is—and no rule is better settled in this court—that no party to a contract can complain of the non-observance of a provision of it which is wholly for the benefit of the opposite party.

An argument founded upon the assumption that defendant can take advantage of a failure to enforce a provision of this charter, from which it could have gained no possible benefit; a provision, the enforcement of which can only result in advantage to the state and disadvantage to itself, is an argument founded upon the sand.

Counsel furthermore assume that the state tax provided in section 22 is a tax in the strict constitutional sense; that since this is true, valuation and assessment are essential to its enforcement, and these essentials cannot be waived either by the defendant or the auditor, or both, and a bill be filed to collect the tax or an equivalent therefor. If their premise is true, their conclusions follow, and it will not be necessary to discuss the steps essential to the enforcement of a constitutional tax.

In support of their contention, that the payment required by section 22 is a tax in the strict sense, counsel cite an opinion rendered by me in 1906 to the auditor of public accounts. I want to assure both counsel and the court that if I now believed this opinion was wrong, it would not embarrass me in the least to say so. Former opinions have no terrors for me. During my career as attorney general, I have had to back up on a number of occasions. Unless I either die or resign—and I hope I won't die and I know I won't resign—in all probability I will back up again.

Two questions were submitted to me by the auditor. These questions were:

1. Should the state tax rate be extended against the full value of defendant's stock, property and assets, or against the one-fifth or assessed value?

2. In the assessment of defendant's property by the auditor, do the provisions of the general revenue laws as to credits and deductions apply?

In answer to these questions, I held that the rate should be extended against the assessed or one-fifth valuation, and such deductions should be allowed from credits as the general revenue laws provide. In discussing the first question, I expressed the view that it was the duty of defendant to list its property annually with the auditor for state taxation; that it was the duty of the auditor to assess a state tax thereon, and in the event the defendant failed to list its property, it was the duty of the auditor to assess the tax under the act of 1859.

No question was before me as to whether the obligation to pay the tax grew out of the taxing power or grew out of contract. I am frank to say, when the opinion was given, so far as I was concerned, this question had never been thought of. It is possible that expressions can be found in this opinion, which, wholly disconnected from the questions submitted, may afford defendant's counsel some little consolation. If so, they are welcome to it.

Whoever reads this opinion as a whole, will find that its dominating idea is, that the charter requires defendant to list its property and pay a state tax, and since no method of assessment and no basis of valuation were prescribed by the charter, the legislature intended the property should be assessed in the same manner and upon the same basis as any other like property.

I believed this opinion was right then and I believe so now. I believed then and believe now that under section 22 the defend-

ant must list its property for taxation and the auditor must assess a state tax thereon. This provision was enacted for the benefit of the state. Its enforcement is essential to the interests of the state.

The state is entitled, each and every year, to have the tax measured and determined under its general revenue laws, as provided by the charter, in order to know whether or not the time has come when defendant must pay more than seven per cent upon its gross receipts. It is not required to accept the judgment of defendant, nor the judgment of the auditor, nor the judgment of both of them. Whenever the defendant fails to list its property and take the steps required of it to determine the amount of the state tax, it violates its contract. When this opinion is fairly considered, there is nothing in it which conflicts with the position we now take or have ever taken. And if there was, it would make no difference.

Our contention is, that while the amount of the payment, denominated a tax in section 22, *must be ascertained and determined through the machinery of the revenue laws by listing defendant's property and applying the rate to its valuation as in any other case, the obligation to make the payment grows out of contract and does not result from the taxing power.*

A tax, in the constitutional sense, is "the enforced proportional contribution from persons and property levied by the state for the support of the government." The obligation to pay the tax does not arise out of contract, either express or implied. It is the positive act of the government, binding upon the citizen, regardless of either his wish or consent. Because the tax is exacted by law and without his consent, the citizen has a right to insist that the provisions of the law shall be strictly complied with. These provisions cannot be waived, and any failure to comply with them deprives the taxing body of all right either to collect the tax itself or any equivalent therefor. Nobody claims, nor has ever claimed, that a bill will lie to collect a tax, or a substitute therefor, under an obligation created by the taxing power. The obligation here was not so created.

Under this charter, the state adopted an entirely different plan. Instead of leaving the defendant subject to the general revenue laws and its property liable to taxation in the same manner and to the same extent as the property of other corporations, it made an essentially different arrangement. It exempted the defendant, in express terms, from the payment of all taxes

except state taxes. While other corporations, in addition to state taxes, were required to pay county, city, town, school district and other taxes, the defendant was relieved from all such exactions. This relief was given to the defendant, not by law, but by contract. The entire tax liability of the defendant is, therefore, a contract liability. The charter, as to this liability, cannot be treated by defendant as a contract whenever it serves the interests of defendant to treat it as a contract, and as a tax whenever it serves the interests of defendant to treat it as a tax.

While one of the payments is called a tax, the amount of which is to be ascertained by adopting the rule applied to the ascertainment of state taxes upon the property of other corporations, this does not make the payment a tax in the constitutional sense. The liability to make the payment grows out of the contract and is not referable to the taxing power.

The amount of the payment is certain, because it can be made certain. The means provided to ascertain the amount, is the machinery employed to levy a state tax. But this does not make the amount, when ascertained, a tax payment. It still remains a contract payment.

That the payment provided in section 22, though denominated a tax, is not a tax in the constitutional sense, but simply a payment due under a contract, was demonstrated by defendant's counsel in an argument filed in this court in support of the motion to dismiss the original bill. As heretofore stated, the original bill was filed in this court upon the theory that the payments required under the charter constituted revenue, and therefore this court had original jurisdiction. The original bill was framed upon precisely the same theory as the present bill, and the same relief is sought by both.

A motion was made by defendant's counsel to dismiss the suit for want of jurisdiction. The sole ground relied on was that the word *revenue*, as used in the jurisdictional clause, meant taxes, in the sense of enforced obligations; that the payments required under this charter were not taxes in any such sense, but *payments voluntarily agreed to be made on a contract.*

In support of this motion, counsel filed in this court a printed brief and argument of 36 pages. I shall close my argument upon this point by quoting from their argument. My purpose is not to embarass counsel. I would not do it if I could, and I think they know it. My purpose is not to show that counsel have changed front. They have a right to change front. Fur-

thermore, it is no discredit to change front. I use their argument for the simple reason, it is an abler argument than I can make.

On page 6 of this brief and argument, counsel say:

"It is manifest from the bill itself that it is neither founded on a *law* passed for the purpose of raising revenue, nor is it brought to enforce the collection of a tax. It is a suit for an accounting of *payments* voluntarily agreed to be made on a *contract.*"

It is idle to say the language here used referred only to the five per cent. Not only here, but throughout the entire argument, they were discussing the payments required by this charter. Everywhere they used the word "payments." One of the payments is that provided in section 22. Furthermore, it was necessary to show that neither of these payments constituted revenue within the meaning of the constitution. If either was revenue, in a constitutional sense, this court had jurisdiction of a part of the claims set up in the bill, and, under every rule of law, would have retained jurisdiction of the entire bill.

Their argument was, that neither the obligation to pay the five per cent, in section 18, nor the state tax, in section 22, grew out of the taxing power, but out of the voluntary contract, and the relief sought was an accounting under the contract. This argument was sound then and is sound now.

On page 7, they say:

"This suit is not brought to recover that state tax. It is not involved in the present consideration. The only question here is whether this court has jurisdiction of a bill praying for an accounting of payments agreed to be made in consideration of lands and other grants, merely because the state is a party and may derive money from the suit."

On page 20, they say:

"This is a suit on a contract. The state, having received lands from congress, enacted the defendant's charter, which the incorporators were at liberty to accept or refuse. The charter was accepted and thereby was consummated a contract voluntarily entered into by the respective parties. This is not an attempt to collect a tax. The issue relates to the amount claimed to be due the state under defendant's *agreement* to pay a per centum of its gross income—*payments* agreed to be made in consideration of and for the grants and privileges conveyed—not as taxes, but, in part, for *exemption from taxes.* A considera-

tion so to be paid, under a voluntarily made contract, is not a tax nor 'revenue' as understood and defined in this connection."

Counsel thereupon quote from text-writers and decisions, to show that an ordinary tax is an enforced proportional contribution, and is in no sense a contract, either express or implied.

On page 23, counsel say, in substance, *the payment provided in section 22 is a tax, and valuation and extension of the proper rate thereon are essential to its collection. If*, by this statement, they meant anything more than that the amount of the tax contracted to be paid should be determined and measured by the revenue laws, it is absolutely at variance with everything contained in the twenty-two preceding pages and finds no support in the pages which follow. Whatever they meant by this statement, their argument, as a whole, is a demonstration that the obligation to pay the state tax is not referable to the taxing power, but is purely a contract obligation.

To sustain defendant's contention, means to permit it to violate its own contract and reap the benefit of its own wrong doing.

Upon the acceptance of the charter, the obligations imposed by sections 18 and 22 became the obligations of a contract. This fact is now utterly ignored by defendant's counsel. The contract obligations of defendant were: *first*, to pay five per cent of its gross receipts; *second*, to list its property with the auditor annually and to pay the state tax assessed thereon; *third*, to pay into the treasury every year, in per centum and taxes, and if these together were not sufficient by making up the difference, an amount *equal at least to seven per cent of its gross receipts.*

The measure of performance fixed by this contract, until such time as the five per cent and the state tax should exceed it, was seven per cent of the gross receipts. If defendant has failed to pay into the treasury five per cent of its gross receipts, it has violated its contract. This would seem clear. If it has neglected to list its property, it has also violated its contract. The duty to list its property and pay a state tax was as much a part of its contract obligation as was the duty to pay the five per cent. If a failure to do one was a breach of its contract, why not a failure to do the other?

The bill avers, and the demurrers admit, that during each year, from 1859 to 1905, the defendant failed to list its stock, property and assets with the auditor for taxation, as required by section 22. The listing of this property was essential to the levy of the tax. The charter required the defendant to list it. When

it accepted the charter, it agreed to do so. Upon what theory can defendant neglect or refuse to perform its own contract and then take advantage of the fact that its contract was not performed.

It is no answer to say that under the act of 1859 it was the duty of the auditor to list the property in case the defendant failed to list it. One party to a contract is not excused from its performance because the law points out a way by which the other party may protect himself from loss. After the act of 1859 was passed, it was as much the duty of defendant to list its property with the auditor annually as it was before. After the act was passed, a failure to list the property was as much a breach of defendant's contract as it was before.

By failing to list its property and by paying into the treasury seven per cent upon the receipts reported, it waived the observance of every requirement essential to the recovery of the full seven per cent, not only upon the receipts reported, but upon *all* of the receipts. Any other theory would permit the defendant to reap a profit from its own neglect.

If counsel's contentions are correct, the failure of the general assembly, in any year, to provide for raising revenue by the assessment of property and the levy of a tax, would reduce the full measure of the charter obligation from seven per cent to five per cent.

No system of taxation is necessarily permanent. When the charter was granted, the assessment of real and personal property and the levy of a tax thereon was, and has since continued to be, the method pursued of raising revenue to support the state government. But this method may be changed. Whether or not a change is probable is beside the question. The legislature has power to adopt another method.

Section 1 of article IX of the constitution, which provides for the levying of a tax by valuation, also authorizes an occupation tax. Under the constitution, the present scheme may be abandoned and the entire state revenue be raised by an occupation tax and without the valuation and assessment of property. And stranger things have occurred. At the last session of the legislature, this very subject was discussed.

Counsel tell us the charter liability of defendant to pay more than five per cent of its gross receipts depends upon the listing of its property and the levying of a state tax; that the obligation is to pay five per cent as such, a state tax as such, and when the sum of these two does not equal seven per cent of the gross re-

ceipts, to pay the difference as such. They say, until such state tax is levied and its amount ascertained, there can be no "difference," and hence no payment of any kind or character, above the five per cent, is required to be made.

If, then, in lieu of the present scheme of raising revenue by levying a tax by valuation, an occupation tax should be adopted, under counsel's contention, what would be the result?

No taxes being levied by valuation, there could be no assessment upon defendant's property and hence no state tax. There being no state tax, there could be no "difference," and there being no "difference," nothing would be due except the five per cent. And this would be true, notwithstanding the fact that the charter itself expressly provides that the whole amount paid *shall equal at least seven per cent of the gross receipts.*

To so construe this charter means that the legislature can change the measure of defendant's obligation from seven per cent to five per cent, and this too, in spite of a constitutional provision which declares that *not one iota of defendant's liability to pay money into the state treasury, under this charter, shall ever be released or suspended, modified or impaired, by legislative or other authority.* We confidently believe that no court will so construe this charter.

Two per cent in addition to the five per cent of the gross receipts can be recovered from defendant as damages for the breach of its contract.

Defendant's position, in substance, is that it has escaped its contract liability to pay the additional two per cent on account of its breach of another contract liability, namely, its liability to list its property and pay a state tax. In other words, the defendant contends that if it had listed its property, as the charter required, and then refused to pay the additional two per cent, the state could have recovered all of it, but since it refused both to list its property and pay the additional two per cent, the state can recover none of it. According to its view, it has exempted itself from all liability for one wrong by committing another. Under this theory, the more charter obligations the defendant ignores, the less revenue the state gets.

As heretofore shown, the obligation of defendant to list its property is a contract obligation. The failure to list it was a breach of contract. If this failure, together with the auditor's neglect to levy the tax, which was due in part to the failure to list, resulted in the non-payment of the additional two per cent,

an action thereby accrued to the state to recover the damages resulting therefrom, and if these damages can be ascertained, they are recoverable in this suit. That these damages are susceptible of ascertainment is clear. They amount to seven per cent of the unreported receipts. Though they might amount to more, they cannot amount to less, and since the state is content with demanding seven per cent, the defendant cannot be heard to complain.

It matters not what this two per cent is called. Whether we call it two per cent of the gross receipts, representing taxes and the difference between taxes and the two per cent, or whether we call it damages for a breach of the contract, the result is precisely the same. We are not concerned with names. What is wanted is the full amount of money now due the state. And this amount is seven per cent of the gross receipts of the charter lines, which defendant wrongfully omitted to report and upon which nothing whatever was paid.

In view of what has already been said, it is unnecessary to discuss the contentions, that the state, by its bill, declares upon one contract and seeks an accounting upon an entirely different contract; that the state, by retaining the payments made and disclaiming the right to collect the tax, has waived the demand it now asserts; that the bill does not aver the amounts received were less than the five per cent, or that the state is seeking to change the character of the contract obligation in violation of the constitution.

The fallacy of counsel's entire argument is demonstrated by the position they take, and which they are compelled to take, respecting the years 1905 and 1906. During each of these years, as shown by the bill, the defendant listed its property with the auditor, and the auditor assessed a state tax thereon. During each of these years, the amount of the state tax was less than two per cent of the gross receipts. During each of these years, the defendant paid into the state treasury seven per cent upon the gross receipts reported to the governor in its semi-annual statements. This seven per cent included the state tax, five per cent upon the receipts reported, and the difference between the sum of the state tax and the five per cent, and seven per cent of the receipts reported. In other words, the state tax was paid for each of these years, and the bill so avers.

During the years 1905 and 1906 a large amount of charter line receipts were fraudulently omitted from the semi-annual

statements, upon which no per centum was paid. By this bill, the state is seeking to recover seven per cent upon the receipts so omitted. Counsel say, no recovery can be had for these years, because the right to collect the tax is disclaimed in the bill.

In the first place, this disclaimer amounts to nothing as to any year. In the second place, even if it does, it neither has, nor can have, any application whatever to the years 1905 and 1906. During each of these years, the state tax was paid and the demurrers so admit. What does it avail to disclaim the right to collect a tax already paid? You might as well disclaim the right to serve a summons on a dead man.

According to the theory of defendant's counsel, upon the earnings omitted from the semi-annual statements upon which nothing whatever was paid to the state, seven per cent cannot be recovered when a state tax was *not* assessed, and seven per cent cannot be recovered when a state tax *was* assessed. Under such a construction, this charter is a rope of sand.

The last contention urged by counsel, namely, that on the receipts reported in the semi-annual statements two per cent more was paid by defendant than the charter required, and this additional two per cent was accepted by the state in full satisfaction of all its claims against charter line receipts *not* reported, will never be sanctioned by any court until principles of law long ago settled have been completely overturned.

When defendant computed upon the semi-annual statements the amount of seven per cent of the gross receipts, included in the statements, and paid into the treasury the exact amount so computed, it intended to apply, and did apply, to its liability under section 18, five per cent of the receipts so included, and to its liability under section 22, two per cent of the receipts so included.

Two per cent of the receipts included in these semi-annual statements, having been voluntarily applied by defendant to the payment of the obligation in section 22, the payment so voluntarily applied cannot be revoked nor applied to any other claim. And this is true, regardless of the character of the obligation—whether it was a tax or not, or whether defendant was was liable or not.

The doctrine is settled in this court that "money voluntarily paid, even under a mistake of law, but with full knowledge of all the facts, can neither be recovered back nor offset against a claim sought to be recovered."

In Yates v. Royal Insurance Company, 200 Ill., 206, this court, per Justice Boggs, said:

"This court, in numerous cases, has declared that money voluntarily paid to another, under a mistake of law, but with knowledge of all the facts, cannot be recovered back."

It will hardly be claimed, even by defendant's counsel, that when these semi-annual payments were made, the Illinois Central was ignorant of the facts.

If payments voluntarily applied to defendant's obligation under section 22, cannot be recovered back, neither can they be offset against the claim for a per centum upon charter line receipts not included in these semi-annual statements.

In Otis v. The People, 196 Ill., 542, the plaintiff in error sought to offset the amount of an illegal city tax, which he had voluntarily paid, against the school tax sued for. This court, per Justice Hand, said:

"The plaintiff in error voluntarily paid to the county collector the city tax with a full knowledge of all the facts, and the same cannot be recovered back by him, *neither can it be offset against the school tax sought to be collected in this proceeding.*"

In the light of these decisions, what becomes of counsel's contention?

What the state here asks of defendant is, to pay into the treasury seven per cent of charter line receipts, which were wholly omitted from its account and upon which the state has never received a cent. To absolve it from payment because no tax has been assessed, means to disregard the proviso in section 22, reduce the measure of the contract obligation from seven per cent to five per cent, ignore the constitution of 1870, revoke payments voluntarily applied, and permit the Illinois Central Railroad to take advantage of its own wrong.

THE INTERSTATE COMMERCE QUESTION.

The third question presented by the demurrer to the bill as a whole—and the last which I shall discuss—relates to the question of interstate commerce. It arises as follows:

A large part of the receipts of the charter lines are now, and for years have been, derived from the charter lines' share of earnings upon traffic moving between points in Illinois, upon the charter lines, and points without the state. For instance, when a car of freight is transported from Chicago to New Orleans, since a part of the haul is over the charter lines and a part of the service is rendered by the charter lines, a part of the earnings col-

lected for the service is credited to the charter lines, and upon the charter lines' part of this earning seven per cent is paid the state. This has been done, for fifty years, in every case where traffic moved between charter line stations and points beyond the state.

The defendant now contends that since all of this traffic moves interstate, under the commerce clause of the federal constitution, it is not required to pay a per centum upon the charter lines' share of the receipts derived therefrom.

If this contention is sound, it means that the state is entitled to a per centum *only* upon charter line receipts derived from traffic originating *at* and destined *to* points within the State of Illinois. It means that all the joint earnings in which the state has any concern are the joint earnings of the charter lines and the Illinois branches. It means, when a car of freight is hauled from Gilman, Illinois, to Paducah, Kentucky, a distance of 283 miles over the charter lines, and 43 miles over a non-charter line, no per centum is due the state on the charter lines' share of the joint earning. It means, the contract obligation of the Illinois Central, to pay into the treasury, every year, at least seven per cent of the gross receipts derived from the charter lines—an obligation voluntarily made in consideration of lands granted and privileges conferred—is valid and binding only in part. It means that the Illinois Central, during half a century, has wholly misunderstood the law and paid into the treasury, in the way of per centum, millions of dollars it did not owe. It means that, from this time on, the semi-annual payments will be merely bagatelles. It means, in the classical language of Judge Dickinson:

"When this case is over, the Illinois Central, instead of erecting upon the borders of the state, at Cairo and Dunleith, monuments to the god Terminus, will erect a mounment commemorative of the undeplored memory of a percentage upon the transportation of interstate commerce, which has gone into a state of *innocuous desuetude.*"

Counsel contend, *first*, that the words, "gross or total proceeds, receipts or income derived from said road and branches," contained in section 18 of the charter, mean only such proceeds, receipts or income as are derived from traffic which originates and terminates upon the charter lines or upon the charter lines and the Illinois branches. Just why the charter lines' share of receipts from traffic moving between Chicago and Springfield is derived "from said road and branches," and the charter lines'

share of receipts from traffic moving between Chicago and St. Louis is *not* "derived from said road and branches," is not very clear.

When the traffic moves from Chicago to St. Louis, a part of the haul is over the charter lines, a part of the service in making the haul is rendered by the charter lines, and a part of the receipts *for* the haul, in honesty, belongs to the charter lines. To say, that the charter lines' share of these receipts is not "derived *from* the charter lines," to put it mildly, is not convincing. Counsel's lack of faith in this contention is clearly manifest from the closing paragraph of their printed argument, on page 205.

Their second contention is, that if the charter be construed to require the payment of a per centum upon the charter lines' share of gross receipts derived from traffic moving interstate, it amounts to a tax or burden upon interstate commerce or a regulation thereof, within the meaning of section 8 of article I of the federal constitution, which provides that the congress shall have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes."

To support this contention, counsel cite a large number of cases, commencing with The Passenger Cases in 7th Howard, and ending with Galveston Railroad Company v. Texas, 210 U. S. Every one of these cases involved a *tax* in some form or other. These cases are fully discussed in our brief and I cannot take time to comment upon them. These cases hold that congress has the exclusive power to regulate commerce among the several states; that no state has the power to pass any law, the effect of which is to regulate commerce between such state and any other state, and any state law, the effect of which is to impose a tax or burden, in any form, upon interstate commerce, amounts to a regulation thereof by the state, and is therefore void. Under these holdings, counsel insist, that to the extent defendant's charter requires it to pay seven per cent upon the gross receipts derived from interstate traffic, it amounts to a tax or burden upon interstate commerce and is a regulation thereof.

The doctrines announced in the cases cited are admitted, but that these doctrines have any application whatever to defendant's charter is denied.

What is forbidden by the constitution is not every act which appears to be a regulation of or burden upon interstate commerce, but what is forbidden is every act of a *state* done *by virtue of its sovereign power exercised without regard to the consent of the party*

affected, the result of which is to hinder, burden or regulate such commerce. In other words, no state can pass a law requiring corporations or individuals, without their consent or against their will, to pay a tax, or submit to any other burden upon their earnings derived *from* or upon their business, in so far as it relates to interstate commerce. Any attempt to pass such a law is the exercise of power which the state does not possess and its *law* is void.

The reason is plain. A state is forbidden to regulate commerce between itself and any other state. What it cannot do directly, it cannot do indirectly. If a state could tax the receipts of a corporation or an individual, derived from interstate commerce, it could make the tax so onerous as to practically destroy both the right and the power of such corporation or individual to engage in such commerce. And this is the substance of the reasoning in all the cases cited.

No case has been cited and none can be found declaring an act of a state invalid, as amounting to a regulation of interstate commerce, except where the act was a *law pure and simple*, that is to say, *a legislative act*, adopted and enforced without the consent of the corporation or individual affected thereby.

In the Texas case, recently decided and relied on by counsel with so much assurance, as in all the other cases, the act held invalid was a *legislative enactment*. It was a statute of Texas which required all railroads to pay a tax, to be measured by the amount of their gross receipts, and which expressly applied to interstate traffic.

A state occupies two positions: *First*, it occupies the position of a sovereign, and as such, enacts laws regulating the conduct of and imposing burdens upon its citizens and other persons within its jurisdiction. *Second*, it occupies the position of a corporate entity, having power to own, possess and manage property and enter into contracts relating thereto. As a corporate entity, it can exercise dominion over its own property in the same manner and to the same extent as any other corporation. It can sell it for cash or on time or lease it upon whatever terms it pleases. This fact is entirely overlooked by defendant's counsel.

It is plain this constitutional provision is not aimed at *contracts* pertaining to interstate commerce, made either by individuals or corporations. It does not prohibit a corporation from contracting that, in consideration of services rendered or

property conveyed by it to another corporation, the latter shall pay a percentage upon gross receipts derived by it from interstate commerce. As shown by the bill, in the leases made by the Illinois Central with the Iowa lines, this very thing was done. The rental provided in these leases, in part at least, was measured by and based upon the receipts derived from interstate traffic. For this reason the leases were not void and no one has ever so claimed.

This provision of the constitution has no relation to voluntary contracts. If it had, no contract whatever, pertaining to matters within the domain of interstate commerce, could ever be made without the sanction of congress. If it had, nine-tenths of all the leases now in existence between railroad companies and their subsidiary lines would be absolutely void. If it had, no corporation engaged in interstate commerce could argee upon a wage scale with its employees which would be in force beyond a state line.

This provision of the constitution relates solely to the exercise of a *governmental power*. Its purpose was not to restrict the domain of contract, but to vest in congress the entire *governmental power* to regulate commerce among the several states. Having vested all of the *governmental power* to regulate interstate commerce in congress, it necessarily follows that no part of this *governmental power* was reserved to the states, and whenever a state, in any manner or under any pretense, attempts to exercise this *governmental power*, its act is void.

This is the sole function of this constitutional provision. Defendant's counsel, in effect, so admit. On page 146 of their argument, they say:

"The clause of the federal constitution * * * does not apply to individuals, but to *governmental powers*, which, under our system, are exercised by the state and federal governments."

The decisive question then is, in what capacity did the state act when it granted the lands to the Illinois Central to build a railroad, in consideration of the payment by it of seven per cent of the gross receipts derived from said road? Did it act as a sovereign, in the exercise of a governmental power, or did it act as a corporate entity, in the exercise of a contract right over property which it owned or controlled? That it acted solely in the latter capacity is beyond the pale of legitimate discussion. It answers no purpose to theorize about it, because this court has repeatedly decided it.

While the grant was made through the legislature, in the form of a law, and was called a public law, it was not a law in the sense of an exercise of governmental power, When the state, in its sovereign capacity, enacts a law, it takes effect solely by virtue of its enactment. The *time* when the law takes effect may depend upon circumstances, but whenever determined or however determined, the law takes effect because of the sovereign power behind it.

The charter of defendant did not take effect because of its enactment by the general assembly. It did not compel the incorporators named in it to organize themselves into the Illinois Central Railroad Company, or take the lands, or build the road, or pay into the treasury seven per cent upon the gross receipts. After this charter was adopted by the legislature and signed by the governor, until its acceptance, it was simply a business offer made to the thirteen incorporators named in it concerning property which the state then controlled in its corporate capacity. When the charter was accepted, it became a *contract.* It is a contract yet. As a contract, it can never be changed except by the consent of both contracting parties, and this court has repeatedly so held. Since the per centum due under this charter grows out of contract and not out of the exercise of any *governmental power*, this prohibition of the constitution has no relation to it.

Furthermore, the enforcement of this per centum is in no sense an interference *with* or regulation *of* interstate commerce. The company is not authorized to impose the burden of this per centum or any part thereof upon passengers or shippers. Under the charter, it must bear this burden itself. The payment of this per centum is no more a tax or burden upon interstate commerce than any other like payment made to a private corporation under a similar contract.

When this suit was begun, the Illinois Central evidently concluded it would be a good plan to start a back fire. Without much delay, it proceeded to do it with the commerce clause of the federal constitution. But it won't stop the suit.

Counsel say, when this question is finally determined, the state's per centum upon earnings derived from interstate commerce will go into a state of *innocuous desuetude.* Of course it may go there, but the probability does not disturb our sleep. Any question of law, affecting the financial interests of the

Illinois Central, which for thirty years has been entirely overlooked by the legal department of that company, is not very grave.

In his argument in the court below, which was printed in pamphlet, Judge Dickinson said:

"Upon all these questions of which the governors, who were directors of this railroad company, are presumed to have known, every governor of the State of Illinois back for thirty years is arraigned and his administration is smirched by this bill, and you cannot make anything else out of it. It charges either that they did not know what they ought to have known, and thus were guilty of neglect, or knowing what they ought to have known and not requiring an accounting for it, were guilty of worse conduct."

If this argument is sound as to state officials, it is also sound as to railroad officials. And I say to Judge Dickinson, if there is any merit in the contention now urged, your own argument is the severest arraignment of the ignorance and neglect of the legal department of a railroad company that was ever made in a court of justice.

For thirty years the Illinois Central has voluntarily accounted, or pretended to account, for seven per cent of the charter lines' share of all the joint earnings derived from the carriage of interstate commerce.

During these years, the records of this court show that the legal affairs of the Illinois Central were directed by men whose fame for astuteness and knowledge of law was as wide as the nation. Among these lawyers were B. F. Ayer, Judge Fentress, and last, but by no means least, Jacob M. Dickinson, of Tennessee.

During the eighties, he frequently served, by special commission, on the supreme bench of that state. For two years he was assistant attorney general under President Cleveland. In 1903 he was counsel for the government before the Alaskan Boundary Tribunal. In 1907 he was president of the American Bar Association. Ten months ago, because of his recognized legal attainments, President Taft made him Secretary of War.

For nearly ten years, Jacob M. Dickinson was general counsel of the Illinois Central and head of its law department. During this time, the principles regulating interstate commerce were the same principles which regulate it now. Recent decisions

have not changed the principles, and the courts so hold. During this time, twice every year, under the advice or with the full knowledge of its legal department, the Illinois Central voluntarily paid, or pretended to pay, into the state treasury seven per cent on the charter lines' share of all the receipts derived from the carriage of interstate commerce.

If the objection now raised is a valid objection; if no per centum is due the state upon earnings derived from interstate traffic; if the commerce clause of the federal constitution applies to this charter, the legal adviser of the Illinois Central, through ignorance of law or neglect of duty, has cost the company millions of dollars, and he ought to pay it back. In the language of Judge Dickinson:

"Either he did not know what he ought to have known, or knowing what he ought to have known, was guilty of worse conduct."

Any contention which involves these assumptions does not seriously alarm the state. We have no fears that when this question is finally determined, the realm of god "Terminus" will be disturbed. I shall not indulge in any prophecies. I will not say, when this suit is ended, any monuments will be erected at Cairo and Dunleith. But if any monuments are erected, I venture a guess that upon these monuments will be written this inscription: "Sacred to the Memories of Bridge Arbitraries and Constructive Mileage."

CONCLUSION.

Many of the contentions urged by defendant's counsel are premature. When the bill is answered and these contentions become issues, the state will meet them. This bill must be tested by the facts averred in it and the reasonable inferences resulting therefrom. These facts are admitted by the demurrers. They cannot be ignored in the argument of the demurrers.

In view of the nature of this contract, the fiduciary relation created by it, the character of the transactions had under it, the peculiar knowledge possessed by defendant and the magnitude of these accounts, we confidently believe the averments of this bill are amply sufficient to meet the requirements of every rule of pleading, when reasonably construed, as it ought to be, to promote justice and not defeat it.

I am fully aware that this court neither expects nor desires a vote of thanks for discharging a duty. But I cannot conclude without expressing to every member of this court my sincere appreciation for the earnest and patient attention with which you have listened to this long and necessarily tedious argument.

EXHIBIT "1."

Illinois Central System.

CHARTER LINES.

	Miles.	Miles.
Chicago, Ill., to Cairo, Ill	364.73	
Dunleith, Ill., to Branch Junct., Ill	340.77	
Total mileage charter lines		705.50

NON-CHARTER LINES.

Gilman, Ill., to East St. Louis, Ill	209.06
St. Charles Air Line Junct., Ill., to Freeport, Ill	112.14
East St. Louis, Ill., to Murphysboro, Ill	84.25
Murphysboro, Ill., to Texas Junct., Ill	1.00
Texas Junct., Ill., to Carbondale, Ill	7.72
Pekin, Ill., to Decatur, Ill	67.38
Hervey City, Ill., to Evansville, Ind	160.22
Pinckneyville, Ill., to Eldorado, Ill	59.85
Murphysboro, Ill., to Carbondale, Ill	7.00
Carbondale, Ill., to Brookport, Ill	70.64
Belleville, Ill., to E. Carondelet, Ill	17.30
Carbondale, Ill., to Johnston City, Ill	19.15
Texas Junct., Ill., to Gale, Ill	46.65
Gale, Ill., to Thebes, Ill	1.67
McClures, Ill., to E. Cape Girardeau, Ill	4.18
Champaign, Ill., to Havana, Ill	100.58
White Heath, Ill., to Decatur, Ill	31.04
Otto, Ill., to Normal Junct., Ill	79.46
Buckingham, Ill., to Tracy, Ill	10.00
Kempton Junct., Ill., to Kankakee Junct., Ill	41.80
Reevesville, Ill., to Golconda, Ill	17.20
Christopher, Ill., to Herrin Junct., Ill	11.88
Mounds, Ill., to Olive Branch, Ill	10.49
Groves, Ill., to Sand Ridge, Ill	17.26

Wallace, Ill., to Madison, Wis	61.80
Cedarville Junct., Ill., to Dodgeville, Wis	57.36
Mounds, Ill., to Mound City, Ill	2.87
Stewartsville, Ind., to New Harmony, Ind	6.33
West Lebanon, Ind., to Le Roy, Ill	74.43
67th Street, Chicago, Ill., to South Chicago, Ill	4.76
Blue Island Junct., Ill., to Blue Island, Ill	3.96
Kosciusko, Miss., to Aberdeen, Miss	87.89
Winfield, Ala., to Brilliant, Ala	7.84
E. Cairo, Ky., to New Orleans, La	547.71
E. Cairo, Ky., to Paducah, Ky	31.89
Aberdeen Junct., Miss., to Kosciusko, Miss	18.37
Grenada, Miss., to Memphis, Tenn	100.00
Louisville, Ky., to Memphis, Tenn	392.21
Cecelia, Ky., to Hodgenville, Ky	17.10
Horse Branch, Ky., to Owensboro, Ky	42.16
Evansville, Ind., to Princeton, Ky	99.84
Gracey, Ky., to Hopkinsville, Ky	10.06
Morganfield, Ky., to Uniontown, Ky	6.43
De Koven, Ky., to Ohio River, Ky	1.46
Blackford, Ky., to Dixon, Ky	18.40
Dubuque, Ia., to Sioux City, Ia	326.26
Manchester, Ia., to Cedar Rapids, Ia	41.85
Onawa, Ia., to Sioux Falls, S. D	155.58
Tara, Ia., to Council Bluffs, Ia	133.38
Cedar Falls Junct., Ia., to Glenville Junct., Minn	94.88
Stacyville Junct., Ia., to Stacyville, Ia	7.93
Hervey City, Ill., to Decatur, Ill., (½ interest)	7.52
Hopkinsville, Ky., to Nashville, Tenn	84.64

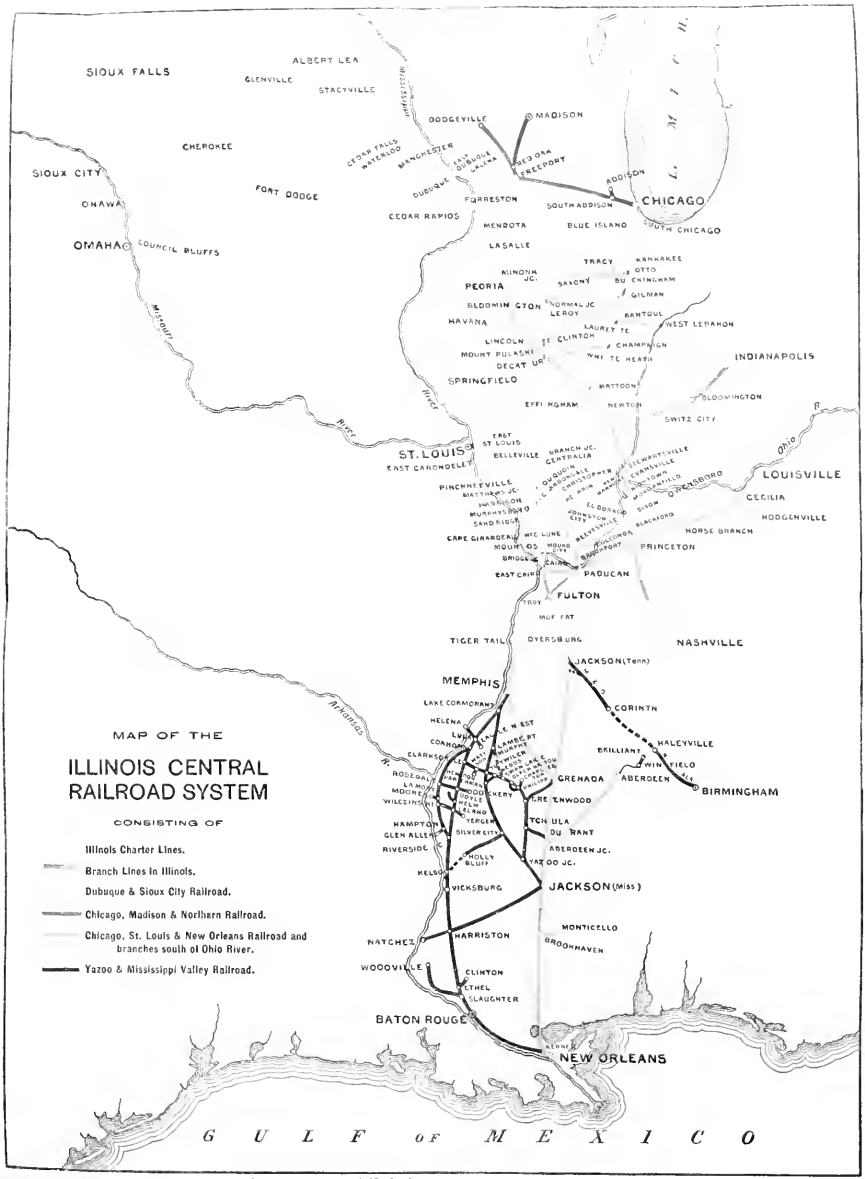
TRACKAGE RIGHTS.

Pekin, Ill., to Peoria, Ill	9.21
Olive Branch, Ill., to Thebes, Ill	9.34
Total miles operated	4,377.44

CAIRO BRIDGE

CAIRO BRIDGE

CAIRO BRIDGE



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